Supreme Court, U.S.
FILED

93 1729 MAY - 2 1994

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

DOUGLAS NYHUIS

Petitioner,

-vs-

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN A. VOS (P38643)
Counsel of Record
200 North Division
Grand Rapids, Michigan 49503
616/235-0134

QUESTIONS PRESENTED FOR REVIEW

A. WAS PETITIONER SUBJECTED TO MULTIPLE PUNISHMENT IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE WHEN HE WAS PROSECUTED AND PUNISHED FOR THE VERY SAME CONDUCT WHICH, ALTHOUGH NOT CHARGED IN AN EARLIER PROSECUTION, HAD BEEN MADE THE SUBJECT OF AND ACCOUNTED FOR IN A PLEA AGREEMENT IN THAT EARLIER PROSECUTION AND USED TO INCREASE PETITIONER'S SENTENCE IN THE EARLIER PROSECUTION BY FOUR YEARS?

B. HAS PETITIONER BEEN PROSECUTED AND PUNISHED IN VIOLATION OF THE USE AND TRANSACTIONAL IMMUNITY GRANTED TO HIM BY THE GOVERNMENT IN THE EARLIER MICHIGAN PROSECUTION?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. UNITED STATES OF AMERICA
   (Plaintiff-Appellee in Lower Court Proceedings)

2. DOUGLAS NYHUIS
   (Defendant-Appellant in Lower Court Proceedings)

3. ANICIA MARIVEL RIPOLL, a/k/a ANICIA GOODMAN
   (Defendant-Appellant in Lower Court Proceedings)

TABLE OF CONTENTS

Questions Presented for Review.....i

List of All Parties to the Proceeding in the Court Whose Judgment is Sought to be Reviewed.....ii

Table of Contents.....iii,iv

Table of Authorities.....v-viii

Opinions Delivered in the Case by Other Courts.....1

Statement of Jurisdiction.....2

Constitutional Provisions Involved.....2

Statement of the Case.....3

Reasons for Granting the Writ.....25

A. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS RENDERED A DECISION IN CLEAR CONFLICT WITH DECISIONS OF OTHER FEDERAL CIRCUITS ON THE SAME ISSUE IN FINDING THAT PETITIONER WAS NOT SUBJECTED TO MULTIPLE PUNISHMENT IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE WHEN HE WAS PROSECUTED AND PUNISHED FOR THE VERY SAME CONDUCT WHICH, ALTHOUGH NOT CHARGED IN AN EARLIER PROSECUTION, HAD BEEN MADE THE SUBJECT OF AND ACCOUNTED FOR IN A PLEA AGREEMENT IN THAT EARLIER PROSECUTION AND USED TO INCREASE PETITIONER'S SENTENCE IN THE EARLIER PROSECUTION BY FOUR YEARS.....25

B. PETITIONER HAS BEEN PROSECUTED AND PUNISHED IN VIOLATION OF THE USE AND TRANSACTIONAL IMMUNITY GRANTED TO HIM BY THE GOVERNMENT IN THE EARLIER MICHIGAN PROSECUTION.....51

Conclusion.....62

Appendix:
(Separately Bound)

Published Opinion of the Court of Appeals for the Eleventh Circuit, United States v Douglas Nyhuis, 8 F 3d 731 (11th Cir., 1993).....1a

February 2, 1994, Order of the U.S. Court of Appeals Denying Petition for Rehearing and Suggestion of Rehearing En Banc.....63a

April 4, 1991, Order and Opinion of the U.S. District Court, Middle District of Florida, Denying Motion for Dismissal Based on Grounds of Double Jeopardy and Immunity.....65a

December 13, 1989, Plea Agreement in U.S.A. v Douglas Nyhuis, U.S. District Court, Western District of Michigan, Case No. G89-178-01 CR.....88a

May 25, 1990, Stipulation to Amend Plea Agreement in U.S.A. v Douglas Nyhuis, U.S. District Court, Western District of Michigan, Case No. G89-178-01 CR.....95a

July 10, 1990, Government Sentencing Memorandum in U.S.A. v Douglas Nyhuis, U.S. District Court, Western District of Michigan, Case No. G89-178-01 CR..97a

TABLE OF AUTHORITIES

Cases:

Ball v United States,
470 U.S. 856; 105 S Ct 1668;
84 L Ed 2d 740 (1985).....33,35

Garrett v United States,
471 U.S. 773; 105 S Ct 2407;
85 L Ed 2d 764 (1985).....33

Green v United States,
355 U.S. 184; 78 S Ct 221;
2 L Ed 2d 199 (1957).....44

Gryger v Burke,
334 U.S. 728; 68 S Ct 1256;
92 L Ed 2d 1683 (1948).....45

Kastigar v United States,
406 U.S. 441; 32 L Ed 2d 212;
92 S Ct 1653 (1972).....51,52,54,55

Mabry v Johnson,
467 U.S. 504; 81 L Ed 2d 437;
104 S Ct 2543 (1989).....57

Missouri v Jenkins,
495 U.S. 33; 109 L Ed 2d 31;
110 S Ct 1651 (1990).....25

North Carolina v Pearce,
395 U.S. 711; 89 S Ct 2072;
23 L Ed 2d 656 (1969).....28

Santobello v New York,
404 U.S. 257; 92 S Ct 495;
30 L Ed 2d 427 (1971).....60

Sekou v Blackburn,
796 F 2d 108 (CA 5, 1986).....28,40,45

United States v Boatner,
966 F 2d 1575 (CA 11, 1992).....60

United States v Carter,
454 F 2d 426 (CA 4, 1972)
(en banc), cert. denied,
417 U.S. 933; 94 S Ct 2646;
41 L Ed 2d 237 (1974).....61

United States v DiFrancesco,
449 U.S. 117; 66 L Ed 2d 328;
101 S Ct 426 (1980).....43

United States v Fogel,
829 F 2d 77 (DC Cir., 1987).....43

United States v Garcia,
919 F 2d 881 (CA 3,
1990).....28,35,40,41,45,47,48,50

United States v Garcia,
954 F 2d 12 (CA 1, 1992).....57

United States v Halper,
490 U.S. 435; 104 L Ed 2d 487;
109 S Ct 1982 (1989).....42

United States v Hampton,
775 F 2d 1479 (CA 11, 1985).....55

United States v Koonce,
884 F 2d 349 (CA 8, 1989).....30

United States v Koonce,
885 F 2d 720 (CA 10,
1989).....22,31,32,34

United States v Koonce,
945 F 2d 1145 (CA 10, 1991) cert. denied, ___ U.S. ___; 112 S Ct 1695; 118 L Ed 2d 406, and cert. denied, ___ U.S. ___; 112 S Ct 1705; 118 L Ed 2d 413 (1992)..27,29-31,35,36,38,40

United States v Mack,
938 F 2d 678 (CA 6, 1991).....28,35,39-41,45,46

United States v McCormick,
992 F 2d 437 (CA 2, 1993).....27,36-41

United States v McGovern
822 F 2d 739 (CA 8), cert. denied, 484 U.S. 956; 108 S Ct 352; 98 L Ed 2d 377 (1987).....59

United States v Douglas Nyhuis,
8 F 3rd 731 (CA 11, 1993).....1,24

United States v Pleasant,
730 F 2d 657 (CA 11), cert. denied, 469 U.S. 869; 105 S Ct 216; 83 L Ed 2d 146 (1984).....45

United States v Savage,
978 F 2d 1136 (CA 9, 1992).....59

United States v Troxell,
887 F 2d 830 (CA 7, 1989).....28,40,45,46

United States v Williams,
935 F 2d 1531 (CA 8, 1991).....35

Williams v Oklahoma,
358 U.S. 576; 79 S Ct 421; 3 L Ed 2d 516 (1959).....39

Constitutional Provisions:

United States Constitution,
Fifth Amendment.....2,54,62

Statutes:

21 U.S.C. § 841.....3,14

21 U.S.C. § 846.....3,14

21 U.S.C. § 848.....3

28 U.S.C. § 1254(1).....2

OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

On April 4, 1991, the United States District Court, Middle District of Florida, Hon. Patricia C. Fawsett, denied Petitioner's motions to dismiss the indictment based on grounds of double jeopardy and immunity in an unpublished Order and Opinion (65a).[1]

On December 2, 1993, the United States Court of Appeals for the Eleventh Circuit affirmed the United States District Court's denial of the aforementioned motions and affirmed the Petitioner's conviction and sentence in a published Opinion, United States v Nyhuis, 8 F 3d 745 (11th Cir., 1993) (1a). On February 2, 1994, the Eleventh Circuit denied Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc in an unpublished PER

[1] References are to pages of the Appendix which is filed or presented to the Court in a separate volume.

CURIAM Order. (63a).

STATEMENT OF JURISDICTION

Petitioner moves this Honorable Court now for a Writ of Certiorari and review of the aforementioned Judgment of the United States Court of Appeals for the Eleventh Circuit entered on December 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Malitia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just

compensation.

United States Constitution, Amendment Five. (Emphasis added)

STATEMENT OF THE CASE

Approximately one year before the Petitioner, Douglas Nyhuis, was indicted in Florida in the instant case, he was indicted in a U.S. District Court in Michigan. Specifically, on December 14, 1989, Petitioner was indicted in the U.S. District Court for the Western District of Michigan on two counts of a 26-count indictment. He was charged with one count of Conspiracy to Distribute a Controlled Substance in violation of Title 21, United States Code, §§ 841 and 846. In Count 26, Petitioner was charged with a Continuing Criminal Enterprise (CCE) in violation of Title 21, United States Code, § 848. Overt acts with which Petitioner was charged in these counts consisted solely of Petitioner's involvement with marijuana

from the years 1985 through 1987.

On January 29, 1990, Petitioner, pursuant to a plea agreement signed by the parties on December 13, 1989, (88a) tendered a guilty plea before U.S. District Judge Richard A. Enslen to the count of CCE (Count 26). In exchange for Petitioner's plea and his cooperation with the DEA including providing information and testifying[2], the Government agreed to the following:

> 4. The United States Attorneys Office agrees:
>
> (a) To make a binding sentence recommendation that the sentence to be imposed by the Court be one of ten years (the statutory minimum). This will be a binding recommendation

[2] In fact, in keeping with the December 13, 1989, plea agreement, Petitioner testified before a Michigan grand jury on December 14, 1989, to further the government's investigation of related crimes. (See transcript of January 24, 1991, evidentiary hearing held before Florida District Court Judge P.C. Fawsett, p. 20)

> pursuant to Federal Rule of Criminal Procedure 11(a)(1)(C); and
>
> * * * *
>
> (c) The Government agrees not to bring additional criminal charges against the defendant in the Western District of Michigan arising out of his involvement in the distribution of marijuana and those transactions disclosed by the defendant in the proffer already made to the Government.
>
> (d) To dismiss Count I of the Information at the time of sentence.

(91a and 92a) At the January 29, 1990, proceedings held before Judge Enslen, the Court stated that

> Paragraph (c) is a very important agreement as far as you are concerned, and may be -- the Government agrees not to bring any additional criminal charges against you involving the distribution of marijuana, and in the Western District of Michigan.[3]

---

[3] Transcript of January 29, 1990, Plea Proceeding in U.S.A. v Douglas Nyhuis, U.S. Dist. Court, W. District of Mich., Case No. G89-178-01 CR.

The Court indicated it would accept or reject the plea and plea agreement only after it had an opportunity to review Petitioner's presentence.

On May 24, 1990, the Government filed a sentencing memorandum in which it informed the Court that Petitioner had neglected to inform the Government of his involvement in cocaine distribution in 1986 and neglected to tell that he was also instrumental in 1989 in introducing persons to one George Marian for the purpose of facilitating marijuana and cocaine dealing. On May 25, 1990, the parties entered into a written stipulation to the plea agreement which had been entered into on December 13, 1989, and placed on the record on January 29, 1990. Specifically, paragraph 4(a) was amended to reflect that the Government was making a binding recommendation that Petitioner's sentence not exceed 15 years. (91a) Also on May 25, 1990, the parties appeared

before the Court to confirm the amendment to the plea agreement. Judge Enslen then inquired as to whether the presentence report contained information regarding Petitioner's cocaine involvement, and, upon hearing that such information was not in the report, the Court again declined to accept or reject the plea and plea agreement. Counsel for Petitioner then expressed concern over the Court's decision to defer its decision on the plea, indicating that without the Court's acceptance of the plea agreement and tendered plea, Petitioner might, upon testifying pursuant to the plea agreement, be subject to additional prosecution.[4] In response, the Government replied that

> [A]s far as the agreement, the Defendant's agreement, if the Court accepts the ultimate agreement of

---

[4] Transcript of May 25, 1990, Plea Proceeding in U.S.A. v Douglas Nyhuis, U.S. Dist. Court, W. District of Mich., Case No. G89-178-01 CR, pp. 16-18.

> the parties, the Defendant is fully protected.[5]

The Court then again indicated its desire to review Petitioner's presentence report, including information regarding a statement Petitioner had made to the authorities in April of 1990 pursuant to his plea agreement, and adjourned the proceedings.

A June 6, 1990, U.S. Probation Department memorandum made reference to an April 6, 1990, debriefing by Petitioner at which time Petitioner allegedly indicated that he did not previously disclose his cocaine involvement because he had been indicted on charges of marijuana distribution only. Petitioner then disclosed that he received approximately 4 kilograms of cocaine from George Marian in September of 1986, received 4 kilograms of cocaine from November of 1987 to February of 1988, and that in mid-1989 he placed

---

[5] Id., p. 19.

Mark DeVries in contact with George Marian facilitating another cocaine transaction. Additionally, he arranged for another individual to obtain a kilogram of cocaine from George Marian in Florida.

In a July 10, 1990, Government sentencing memorandum, the Government informed the Court that the Government had gained additional information from Petitioner as well as from other cooperating individuals regarding Petitioner's cocaine involvement. This information included the following: (1) in February of 1989, Petitioner sent a Grand Rapids man to Florida to secure one kilogram of cocaine from a Florida resident; and (2) subsequent to February of 1989, Petitioner arranged for Mark DeVries to purchase a kilogram of cocaine from the Florida source and provided a beeper number to Mark DeVries to facilitate purchase of a second kilogram. The Government

concluded that Petitioner was responsible for the purchase and distribution of six to nine kilograms of cocaine from 1986 through 1989. (100a and 101a) The Government then recommended that the Court accept the amended plea agreement, stating its belief that Petitioner had "complied with his promise to cooperate with the Government on this investigation and others," and that Petitioner's

> testimony was crucial to securing the conviction of six co-defendants at trial recently and his publicized willingness to cooperate with authorities was a motivating factor in securing other guilty pleas from co-defendants.

(104a) The Government recommended finally that the Court impose the maximum sentence of 15 years incarceration. (105a)

At Petitioner's July 16, 1990, sentencing, the Court inquired of the Government why, if Petitioner's testimony was responsible for the conviction of many co-defendants, the Government continued to

recommend the maximum sentence. U.S. Attorney Mark Courtade replied

> Because, Your Honor, as we stated within our sentencing memorandum, his involvement was still extensive. His involvement was with many tons of marijuana and with cocaine.
>
> Quite frankly, the Defendant is going to continue to cooperate. It is not part of his plea agreement. But should he continue to cooperate with the government in its investigation here and in Florida, it is our intention to join with him in seeking a reduced sentence should that be warranted.
>
> * * * *
>
> ....We negotiated an agreement which called for the minimum sentence of ten years. We did that without full knowledge of other involvement of Doug Nyhuis. We believe that because of that other involvement it would warrant an additional sentence.
>
> We negotiated again in good faith with defense counsel, and their agreement was 15 years, which we would believe would have been covered by the involvement with cocaine, if we divorced all of the marijuana from the case, or it would have been an agreement that should he have lied -- and I stress to the Court that he did not lie to the grand jury about his involvement in cocaine; there was no lying that

> took place. Should he have, we believe that that would have warranted five years in and of itself.
>
> So we agreed, we -- it was part of our negotiation strategy -- and we arranged that his sentence reflect not only his involvement with cocaine, but should he have been asked those questions, it was an understanding that he could have faced five more years, and you would have given him five more years, or at least five.
>
> So it was kind of comb-, of the adding of the potential criminality should he have lied -- which he did not do -- and his involvement with cocaine divorced from the marijuana, we just figured they were both worth five years, and that is what we sought.... (Emphasis added)[6]

The Court then stated that after hearing the trial of the co-defendants in Petitioner's case it had learned much about the facts underlying the indictments and conviction, and that it was in the interest of justice to accept the amended plea

---

[6] Transcript of July 16, 1990, Sentencing in U.S.A. v Douglas Nyhuis, U.S. Dist. Court, W. District of Mich., Case No. G89-178-01 CR, pp. 7-9.

agreement.[7]

The Court sentenced Petitioner to 14 years imprisonment, $150,000.00 fine, and a $50.00 assessment. It is clear from the statements made by the sentencing court just prior to imposing sentence that the Court considered, in fashioning a sentence, Petitioner's involvement in both marijuana and cocaine.[8] Additionally, the Eleventh Circuit observed in its decision in this case that the "Government does not dispute that the Michigan District Court considered Nyhuis' cocaine activities in sentencing him on the CCE conviction...." (8 F 3rd at p. 740) and in her April 4, 1991, Order and Opinion denying Petitioner's Motion to Dismiss, Florida District Court Judge Fawsett found that the Michigan District Court considered Petitioner's cocaine

[7] Id., p. 11.

[8] Id., pp. 24, 29-30.

involvement and that Petitioner's Michigan sentence included a separate punishment for his cocaine involvement. (72a through 74a)

Pursuant to his amended plea agreement, Petitioner testified on July 18, 1990, before a Michigan grand jury, answering questions posed to him by U.S. Attorney Mark Courtade regarding Petitioner's involvement with one George Marian in the purchasing and distribution of marijuana and cocaine.

On October 10, 1990, Petitioner was indicted in the instant case in the U.S. District Court for the Middle District of Florida and charged in Count II of that indictment with Conspiracy to Distribute in excess of five kilograms of cocaine in violation of Title 21, United States Code, §§ 846 and 841(b)(1)(A)(ii). Overt acts with which Petitioner was charged in Count II consisted of the following:

55. In or around March, 1989, the exact date being unknown to the Grand Jury, the Defendant DOUGLAS NYHUIS, contacted CI [cooperating individual] #20 in Grand Rapids, Michigan, and requested that he/she go to Miami and obtain one kilogram of cocaine from Defendant GEORGE NICHOLAS MARIAN. CI #20 drove to Miami, Florida, and talked to CI #1 on the telephone. CI #20 met with Defendant GEORGE NICHOLAS MARIAN and obtained one kilogram of cocaine. CI #20 drove the kilogram of cocaine to Defendant DOUGLAS NYHUIS in Grand Rapids, Michigan. CI #20 received one ounce of cocaine for his/her services. One week later, CI #20 received approximately 12 ounces of cocaine to sell from Defendant DOUGLAS NYHUIS.

58. In or around July or August, 1989, the exact date being unknown to the Grand Jury, CI #21 visited Defendant DOUGLAS NYHUIS who provided him/her with Defendant GEORGE NICHOLAS MARIAN's telephone number to purchase cocaine. CI #21 and Defendant JAMES FORBES left Grand Rapids, Michigan, and travelled to Florida. Defendant JAMES FORBES and CI #21 called Defendant

> GEORGE NICHOLAS MARIAN and met him in Brevard County, Florida, and obtained one kilogram of cocaine. Defendant JAMES FORBES then placed the cocaine in the vehicle, he and CI #21 used a portion of it, and returned the rest of the cocaine to Grand Rapids, Michigan.

Recognizing that the overt acts charged amounted to the very same conduct for which Petitioner was sentenced and punished in the Michigan District Court, Petitioner filed with the Florida District Court a Motion to Dismiss based on grounds of double jeopardy (multiple punishment). He also filed therewith a Motion to Dismiss based on grounds of immunity, contending that the Florida prosecution violated the use and transactional immunity he had been granted in his Michigan plea agreement. Hearings on these motions were held before Florida District Court Judge Patricia C. Fawsett on January 24, 25, and 29, 1991, and February 5 and 11, 1991.

AUSA Mark Courtade testified that as a result of the Petitioner's December 14, 1989, grand jury testimony in Michigan regarding a marijuana trafficking network, 19 other persons were indicted, most of whom entered into cooperating agreements with the Government. The Petitioner, Courtade testified, could take credit for the cooperation and conviction of James Muth and Mark DeVries, who began cooperating as early as January of 1990. (Transcript of January 24, 25, and 29, 1991, February 5 and 11, 1991, evidentiary hearing (hereinafter "EH"), pp. 83, 94) Some of these cooperating co-defendants, including Mark DeVries and James Muth, later informed the Government of Petitioner's involvement with George Marian and cocaine distribution. (EH, pp. 20-21, 25, 94)

In fact, Mark DeVries and James Muth provided information that linked Petitioner

to George Marian, Jeff Wenrich, and the two cocaine transactions for which Petitioner was later indicted in the instant case. (EH, pp. 25 and 168) The Government then adjusted Petitioner's plea agreement upward from an agreed-upon maximum of 10 years to one of 15 years imprisonment to account for his cocaine involvement. Together, these three witnesses, Muth, DeVries, and Wenrich, accounted for approximately 80 percent of the testimony against Petitioner at his Florida trial.

AUSA Courtade testified that he gave Petitioner both use and transactional immunity, stating for the first time that such immunity was limited to the Western District of Michigan. (EH, p. 51) In the same testimony, however, he stated that "[i]t was my understanding none of the information he imparted to us would be used in any other jurisdiction." (EH, p. 91) He testified that while it was not his

intent to grant immunity in other districts, if the Petitioner continued to cooperate with Florida as well, "[i]t was my hope, from day one, and continues to be today, if he cooperates fully in all cases, other jurisdictions would not charge him." (EH, p. 91)

Florida DEA Agent Douglas Waller testified that in late December of 1989 he was contacted by a customs agent who informed him that one Mark DeVries, an informant, would cooperate to assist in the investigation of George Marian. (EH, pp. 162-164) The agent told Waller that DeVries had been indicted in Grand Rapids, Michigan. (EH, p. 163) Waller then contacted Grand Rapids DEA Agent Scott Herman who then arranged for Waller to interview several cooperating defendants including Mark DeVries and James Muth. (EH, pp. 163-164, 167) Waller testified that he had independently located one

Michael Shanley who provided the name of James Muth, Petitioner's cooperating co-defendant. (EH, pp. 164-166, 183)

In March of 1990, Florida DEA Agent Douglas Waller travelled to Michigan and debriefed Muth and DeVries, whose names had been supplied to the Government in Michigan by Petitioner and indicted there as a result of his testimony. (EH, pp. 167-168) Both Muth and DeVries had signed plea agreements and debriefed to Michigan agents prior to Agent Waller's arrival. These co-defendants again described Petitioner's cocaine involvement to Agent Waller. (EH, p. 169) Michigan DEA Agent Herman attended this debriefing and told Agent Waller following the debriefing that Petitioner had lied when testifying before the Grand Jury in November, 1989, about the extent of his involvement with George Marian. (EH, pp. 169-170, 179) Ultimately, Agent Waller gathered the same information from DeVries

and Muth as Michigan Agent Herman had gathered from them earlier, and later used such information to indict Petitioner in the instant case.

Michigan DEA Agent Scott Herman testified that he first learned of Petitioner's cocaine involvement from Mark DeVries in March, 1990, an individual Petitioner had disclosed in his November, 1989, proffer in Michigan. (EH, p. 116) Herman testified that he used information given by Petitioner in the November, 1989, proffer to obtain arrest warrants and indictments against several persons who later associated Petitioner with George Marian and cocaine distribution. (EH, pp. 128-131) He testified further that he arranged for Florida DEA agents to interview several witnesses who were indicted and cooperating as a result of Petitioner's grand jury testimony. (EH, pp. 165-168)

In an April 4, 1991, Order and Opinion, Judge Fawsett denied Petitioner's Motion to Dismiss based on grounds of double jeopardy finding that under United States v Koonce, 885 F 2d 720, 722 (CA 10, 1989), the multiple punishment issue was not yet ripe for review until Petitioner had actually received some punishment from the Florida District Court. (86a and 87a) Judge Fawsett denied the Motion to Dismiss based on immunity finding that (1) the Florida indictment was brought based on sources independent of Petitioner's proffers, testimony, and information given the authorities in Michigan, and (2) Petitioner was granted transactional immunity only in the Western District of Michigan. (79a and 80a) A jury trial was held before Judge Fawsett from April 9, 1990, through April 15, 1990, and Petitioner was found guilty as charged.

At Petitioner's June 24, 1991,

sentencing, Judge Fawsett revisited the issue of multiple punishment and found that

> [B]ecause the trial judge has a wide discretion to consider factors concerning defendant's past in fashioning a sentence including uncharged criminal activity such as here the cocaine trafficking which was not charged at the time of the sentencing up there, I am going to decline Defendant's motion to apply double jeopardy on the sentencing in this case. (June 24, 1991, sentencing transcript, pp. 6-7)

The Court then found a total offense level of 36, criminal history category IV, and consequent guideline range of 262 to 327 months of imprisonment. The Court then sentenced Petitioner to a 324 month term of imprisonment, followed by five years of supervised release. The Court ordered that this sentence be served concurrently with the sentence imposed by the Michigan District Court on July 16, 1990. (June 24, 1991, sentencing transcript, p. 34)

Petitioner filed a timely appeal with the United States Court of Appeals for the

Eleventh Circuit contending (1) that the Florida prosecution, conviction, and sentence amounted to a second prosecution and punishment for the same offense in violation of the double jeopardy clause, the first time having been a conviction and sentence in the Michigan District Court for operating a CCE and (2) that the Florida prosecution violated the terms of immunity he had been granted as part of his Michigan plea agreement.

On December 2, 1993, the Eleventh Circuit rendered a published decision rejecting altogether Petitioner's claims and affirming his conviction and sentence. United States v Nyhuis, supra. (1a) On December 21, 1993, Petitioner timely filed with the Eleventh Circuit his Suggestion of Rehearing En Banc pursuant to Federal Rule of Appellate Procedure 35(b) and Eleventh Circuit Local Rule 35-6 and 35-11. Pursuant to Local Rule 35-6, a Suggestion

of Rehearing En Banc is treated by that Court as a Petition for Rehearing before the original panel and therefore tolls the 90-day period in which to file with this Court a Petition for Writ of Certiorari. See U.S. Supreme Court Rule 13 and Missouri v Jenkins, 495 U.S. 33; 109 L Ed 2d 31; 110 S Ct 1651 (1990). On February 2, 1994, the Eleventh Circuit rendered a one-page PER CURIAM Order signed by Judge CARNES stating that "[t]he Petition(s) for Rehearing are DENIED...., the Suggestion(s) of Rehearing En Banc are DENIED." (63a)

REASONS FOR GRANTING THE WRIT

A. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS RENDERED A DECISION IN CLEAR CONFLICT WITH DECISIONS OF OTHER FEDERAL CIRCUITS ON THE SAME ISSUE IN FINDING THAT PETITIONER WAS NOT SUBJECTED TO MULTIPLE PUNISHMENT IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE WHEN HE WAS PROSECUTED AND PUNISHED FOR THE VERY SAME CONDUCT WHICH, ALTHOUGH NOT CHARGED IN AN EARLIER PROSECUTION, HAD

BEEN MADE THE SUBJECT OF AND ACCOUNTED FOR IN A PLEA AGREEMENT IN THAT EARLIER PROSECUTION AND USED TO INCREASE PETITIONER'S SENTENCE IN THE EARLIER PROSECUTION BY FOUR YEARS.

This Honorable Court will note that the United States Court of Appeals for the Eleventh Circuit has rendered, in the instant case, a decision in clear conflict with the decisions of other United States Courts of Appeals on the same issue of multiple punishment, and has decided an important question of federal law which has not been, but should be, settled by this Court: Does prosecution and punishment for conduct which, although not charged in an earlier prosecution, had been made the subject of and accounted for in a plea agreement in that earlier prosecution and used to increase the sentence in that earlier prosecution by four years violate the protection afforded by the Double Jeopardy Clause against multiple

punishments for the same offense? The Eleventh Circuit Court's observation in this case that "those Courts of Appeal that have [addressed this question] are in agreement that the Double Jeopardy Clause presents no bar to this practice," (35a) is incorrect. At least two other circuits have recently held to the contrary on the issue as generally framed by the Eleventh Circuit. See United States v Koonce, 945 F 2d 1145 (CA 10, 1991), cert. denied, ___ U.S. ___; 112 S Ct 1695; 118 L Ed 2d 406, and cert. denied, ___ U.S. ___; 112 S Ct 1705; 118 L Ed 2d 413 (1992), and United States v McCormick, 992 F 2d 437 (CA 2, 1993). Other circuits, including some of those cited by the Eleventh Circuit in the instant case, would arguably find a violation of the Double Jeopardy Clause on facts such as those presented in the instant case.

While the Double Jeopardy Clause

protects against multiple punishments for the same offense, North Carolina v Pearce, 395 U.S. 711, 717; 89 S Ct 2072, 2076; 23 L Ed 2d 656 (1969), the Eleventh Circuit framed the issue generally as whether a defendant may be prosecuted and punished for conduct that has already been used to enhance the defendant's sentence for a conviction in an earlier prosecution. 8 F 3d at 738-739. The Court then found the decisions in United States v Mack, 938 F 2d 678 (CA 6, 1991), United States v Troxell, 887 F 2d 830 (CA 7, 1989), United States v Garcia, 919 F 2d 881 (CA 3, 1990), and Sekou v Blackburn, 796 F 2d 108 (CA 5, 1986), to be on point and joined these circuits in holding that the Double Jeopardy Clause does not bar prosecution and punishment for criminal conduct that has already been considered and used as the basis for a sentence enhancement in an earlier prosecution. Describing the issue

simply as one of enhancement, the Court found irrelevant that both Petitioner's plea agreement and his sentence were fashioned by considering the conduct in question.

Approximately three months after Petitioner was sentenced by the Florida District Court, the Tenth Circuit held that the Double Jeopardy Clause prohibits the conviction and sentence for possession of a controlled substance where the same possession was used in a prior proceeding to increase the defendant's sentence under the United States Sentencing Guidelines. In United States v Koonce, 945 F 2d 1145, a South Dakota jury found Koonce guilty of distributing 443 grams of methamphetamine he had mailed to a Sioux Falls post office box. At sentencing, the Court took into account two additional quantities of methamphetamine (1) 963 grams discovered in Koonce's home upon his arrest following a

search and (2) 6,463 grams purchased from Koonce by a cooperating witness. Thus, Koonce's South Dakota sentence was based upon his distributing a total of 7,869 grams. The Court calculated his initial offense level under the U.S. Sentencing Guidelines as 34 by considering all of the aforementioned amounts of methamphetamine. After adjustments for criminal history and an enhancement for possessing firearms during the commission of the offense, the Court found the appropriate sentence range under the guidelines as 235 to 293 months. The Court sentenced Koonce to 240 months imprisonment, the statutory maximum. The Eighth Circuit Court of Appeals affirmed Koonce's conviction and sentence. United States v Koonce, 884 F 2d 349 (CA 8, 1989) (Koonce I).

Koonce was subsequently charged in a Utah District Court for possession with intent to distribute the aforementioned 963

grams of methamphetamine found in his home. Koonce immediately argued that this prosecution violated the Double Jeopardy Clause. The Court refused to dismiss the indictment however and the Eighth Circuit affirmed, United States v Koonce, 885 F 2d 720, (1989) (Koonce II), rejecting Koonce's multiple prosecution claim because he had not been charged in South Dakota for any crime stemming from the 963 grams, and refusing to rule on his multiple punishment claim because the same was not yet ripe for review. On remand, Koonce was found guilty on the possession charge and the Court sentenced him to 97 months on the methamphetamine count to be served concurrent with his South Dakota sentence. The Utah District Court again dismissed Koonce's Double Jeopardy claim at sentencing and Koonce appealed.

The Tenth Circuit employed a three-step analysis to decide that Koonce's

methamphetamine distribution sentence violated the punishment component of the Double Jeopardy Clause: (1) whether Koonce was punished in South Dakota for the methamphetamine found in his home, (2) whether Congress intended that an accused in Koonce's position should receive cumulative sentences from two separate proceedings where both sentences punished the accused for the exact same conduct, and (3) whether the punishment imposed by the Utah Court constituted double punishment under the Double Jeopardy Clause where the sentence imposed ran concurrently with the South Dakota sentence.

The Court first found that when the South Dakota Court factored the 963 grams of methamphetamine into its calculation of Koonce's initial offense level as required under the guidelines, the Court was punishing Koonce for the same conduct of which he was subsequently convicted and

sentenced in the Utah District Court. The Court then remarked that the punishment component of the Double Jeopardy Clause is driven by legislative intent and that if Congress intended multiple punishment for a single act then the combined punishment would simply be viewed as the appropriate punishment determined by Congress to represent the gravity of the offense and would be upheld, citing to Garrett v United States, 471 U.S. 773, 779; 105 S Ct 2407, 2411; 85 L Ed 2d 764 (1985). The Court then stated that absent evidence to the contrary, it is assumed that "Congress ordinarily does not intend to punish the same offense under two different statutes," Ball v United States, 470 U.S. 856, 861; 105 S Ct 1668, 1671; 84 L Ed 2d 740 (1985), and that there was no evidence that Congress intended that one who distributes a controlled substance should receive punishment both from an increase in the

offense level under the guidelines in one proceeding and from a conviction and sentence based on the same conduct in a separate proceeding. The Court found that under the guidelines, Congress intended for quantities of illicit drugs to be aggregated into one punishment, rather than broken down into separate offenses and punished separately. The Court noted that had Koonce been charged in the South Dakota Court with two separate counts - one based upon the methamphetamine mailed to Sioux Falls and one based upon that found in his home - he would have received a sentence identical to the one that was imposed in the South Dakota prosecution based upon the single count of mailing methamphetamine to Sioux Falls because of the "grouping" of certain offense conduct required by the guidelines. The Court then stated

> It is difficult to believe that Congress would have intended the punishment to be larger if the

> government chose to proceed with two different proceedings (counting the Monticello drugs in both proceedings - once for purposes of sentencing enhancement and once for purposes of punishment for the second conviction) than if it chose to consolidate all of the counts in one proceedings. The protections against prosecutorial charge manipulation strongly suggests that Congress did not intend such a result.

945 F 2d, at 1152. The Court in Koonce then found the decisions in Mack, supra, United States v Williams, 935 F 2d 1531 (CA 8, 1991), and Garcia, supra, (cases cited by the Eleventh Circuit Court in the instant case in support of its holding), distinguishable, observing that these cases did not involve punishment for conduct that was previously aggregated into a defendant's base offense level for a related crime.

Finally, the Court found that under Ball, supra, the sentence imposed by the Utah Court violated the Double Jeopardy Clause despite the fact that it ran

concurrently with Koonce's South Dakota sentence.

The Second Circuit in McCormick, supra, cited Koonce, 945 F 2d, supra, with approval and employed the same three-step analysis to find that prosecution of a defendant for fraud that had already been used to determine his guideline offense level in a prior prosecution violated the protection against multiple punishments. McCormick was charged in Connecticut with bank fraud in a 31-count indictment. The loss from these crimes approximated $75,000.00. A few months later he was charged in a Vermont Court with bank fraud and mail fraud in a 41-count superseding indictment. The losses resulting from these crimes exceeded four million dollars. McCormick was convicted by jury in the Connecticut indictment on all counts. At sentencing, the government referred to McCormick's conduct in Vermont to argue

that the loss arising from his crimes approximated a two and one-half to five million dollar range calling for an increase in his base offense level. The government maintained at sentencing that a sentence based in part on the Vermont conduct would preclude further prosecution on the Vermont charges. The sentencing court accepted the government's argument, increased McCormick's offense level, and sentenced him to the top of his guideline sentencing range.

Subsequently, the Vermont Court found that further prosecution there was barred by the Double Jeopardy Clause but only on those counts that were used by the Connecticut Court in raising the offense level. McCormick appealed, arguing that all counts should be covered by the Double Jeopardy Clause.

The Court in McCormick had little difficulty finding that McCormick was

"punished" for the Vermont conduct taken into account by the Connecticut Court when it determined the amount of loss for which McCormick was responsible. The Court also joined the Koonce Court's conclusion that Congress did not intend to allow additional punishment for conduct that was used to enhance a defendant's offense level and mentioned that the policy of grouping similar harms established in the guidelines also served to minimize the risk of prosecutorial manipulation of counts charged in an indictment.

The Court in McCormick stated in a footnote that the government's statements at sentencing that Vermont would not be likely to pursue charges lended support to the decision to dismiss those counts, finding that the Connecticut Court may have sentenced McCormick with the understanding that McCormick would face no other punishment for that conduct. Finally, the

Court agreed that the availability of concurrent sentences did not eliminate the double jeopardy concerns. The Court emphasized that its holding should not be read as undermining the historic authorization of a sentencing judge to consider all of the aggravating and mitigating circumstances involved in the crime, citing to Williams v Oklahoma, 358 U.S. 576, 585; 79 S Ct 421, 427; 3 L Ed 2d 516 (1959). The Court distinguished other cases such Mack, supra, on the basis of congressional intent, finding that Congress intended to consolidate the punishment for certain conduct when it created the guidelines scheme that allows for changes to a defendant's offense level based on related acts.

The Eleventh Circuit's holding in the instant case cannot be reconciled with that of McCormick. To the extent that the cases relied upon by the Eleventh Circuit, i.e.,

Mack, supra, Garcia, supra, Troxell, supra, and Sekou, supra, are indistinguishable, Petitioner submits that the holdings in these cases are simply at odds with the intent of Congress and with the protection afforded by the Double Jeopardy Clause against multiple punishments. Petitioner is mindful that his Michigan conviction and sentence occurred prior to the effective date of the U.S. Sentencing Guidelines, however, the Court's "congressional intent" analysis in Koonce and McCormick should apply and preclude the punishment imposed by the Florida District Court. Moreover, the facts underlying the increased punishment in the Michigan Court, including the intent of the parties and the Michigan Court, strongly favor a finding of multiple punishment of the kind prohibited by the Double Jeopardy Clause.

There is no doubt that Petitioner was punished in Florida for the same conduct

that added four years to his sentence in Michigan. Further, unlike the conduct resulting in enhanced punishment in Mack, supra, and Garcia, supra, Petitioner's cocaine involvement would, if subject to the U.S. Sentencing Guidelines, have been grouped together with the marijuana amounts to calculate a base offense level.

The instant case more closely resembles the circumstances in McCormick, supra, to the extent that the government there made representations that further prosecution would not ensue. In the instant case, the plea agreement included the government's agreement not to bring additional criminal charges against Petitioner arising out of those transactions already disclosed to the government by Petitioner. Prior to the May 25, 1990, plea hearing, Petitioner had divulged on April 6, 1990, information regarding his cocaine involvement in a debriefing. Moreover, at that same plea

hearing, the government stated that "if the Court accepts the ultimate agreement of the parties the Defendant is fully protected." (Emphasis added) Petitioner's cocaine involvement was made the subject of, and accounted for in, his plea agreement and conviction in Michigan, and it was the intent of all parties involved, including the Court, that Petitioner would be protected from further prosecution for his cocaine involvement. At Petitioner's July 16, 1990, sentencing in the Michigan Court, the government in fact labeled the negotiated increase in sentence as a "sentence."

In United States v Halper, 490 U.S. 435, 451, n. 10; 104 L Ed 2d 487; 109 S Ct 1982 (1989), the Court said

> On the other hand, when the government has already imposed a criminal penalty and seeks to impose additional punishment in the second proceeding, the Double Jeopardy Clause protects against the possibility that the government is

> seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding.

Inasmuch as the conduct charged in Florida was no more than what was disclosed and accounted for in Michigan, the Florida prosecution represents such a case.

Equally important to this analysis is the question of whether the Florida Court's sentence upsets Petitioner's legitimate "expectation of finality in the original sentence," i.e., sentence imposed by the Michigan District Court. United States v DiFrancesco, 449 U.S. 117, 139; 66 L Ed 2d 328; 101 S Ct 426 (1980). In United States v Fogel, 829 F 2d 77 (DC Cir., 1987), Judge Bork, writing for the Court, stated that the

> application of the Double Jeopardy Clause to an increase in a sentence turns on the extent and legitimacy of a defendant's expectation of finality in that sentence. If a defendant has a legitimate expectation of finality, then an increase in that sentence is

> prohibited by the Double Jeopardy Clause. If, however, there is some circumstance which undermines the legitimacy of that expectation, then a Court may permissibly increase the sentence. (At p. 87)

Judge Bork observed that one of the interests protected by constitutional finality is that of the defendant to be free from being compelled to live in a continued state of anxiety and insecurity. Green v United States, 355 U.S. 184, 187; 78 S Ct 221, 223; 2 L Ed 2d 199 (1957). If the Florida Court, under the circumstances presented in the instant case, can punish Petitioner again for the same conduct which was accounted for in the earlier conviction and sentence, then the interest in protecting a defendant from being compelled to live in a continued state of anxiety is lost. Any other holding would place form above substance and would be inconsistent with the proper focus of the prohibition against double jeopardy.

The Eleventh Circuit, relying again on Mack, Troxell, Garcia, and Sekou, supra, found the increased punishment in the Michigan Court indistinguishable from an enhanced sentence based on a prior conviction. These two forms of increased punishment, however, are not indistinguishable. The Eleventh Circuit stated in United States v Pleasant, 730 F 2d 657, 662 (CA 11), cert. denied, 469 U.S. 869; 105 S Ct 216; 83 L Ed 2d 146 (1984):

> ....In other words, the underlying offense becomes a greater crime, worthy of greater punishment, when a recidivist commits it. [The dangerous special offender statute], then, gives the sentencing judge more latitude accurately to reflect in his sentence the higher risk to society involved in the crime when a recidivist commits it, and the according enhanced need for a specific deterrence of the offender, general deterrence of like offenders, and retribution for the crime.

See also Gryger v Burke, 334 U.S. 728, 732; 68 S Ct 1256, 1258; 92 L Ed 2d 1683 (1948) (habitual offender sentence "is a stiffened

penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

Prior convictions then, are considered because they reflect that the defendant is unwilling to rehabilitate himself; that he had an opportunity to reform but did not. Both the defendants in Troxell and Mack, supra, committed the conduct resulting in an enhanced sentence following their conviction on the charged offense and thus, Mack and Troxell are distinguishable in this respect, although the Court in those cases did not employ such reasoning.[9]

In Troxell, supra, the enhanced punishment arising out of the defendant's failure to appear for sentencing was

---

[9] This Court will note that the Court in Mack, supra, also relied on Koonce II, 885 F 2d 720, in which the Court addressed an issue of multiple prosecution and later held contrary to Mack on the issue of multiple punishment in Koonce III, 945 F 2d 1145.

directed at the "overall unwillingness to be rehabilitated" demonstrated by the defendant in failing to appear for sentencing. The defendant there was given an opportunity to reform and failed to do so. The Court also remarked that "[m]ere mention of a bad act in sentencing for a crime does not amount to attachment of jeopardy for that act." 887 F 2d at 836. In the instant however, the Michigan Court attached more than "some minimal significance" to Petitioner's cocaine involvement and the punishment was imposed specifically for that conduct rather than a failure to reform after an opportunity to do so.

Garcia, supra, is also similarly distinguishable, and the Court's analysis in Garcia actually supports a finding of a double jeopardy violation in the instant case. The Court in Garcia found that it was the defendant's concealment of certain

drug offenses rather than the drug offenses themselves that resulted in a heavier sentence and thus the defendant was not already "punished" for those offenses. The Court was clearly of the opinion that should the defendant demonstrate that the Court imposing the original sentence used such information for the obvious purpose of imposing punishment for the unadjudicated conduct the defendant would have presented a *prima facia* case of a double jeopardy violation. 919 F 2d at 887. Undoubtedly, the Garcia Court would not be likely to hold that circumstances such as those presented in Petitioner's case never pose double jeopardy concerns, rather, only that a *prima facia* case of a double jeopardy violation would require more than merely showing that the presentence report in the first prosecution made reference to the unadjudicated criminal conduct.

Petitioner does not contest that a

sentencing court is entitled to consider all relevant information concerning all aspects of the defendant's life when fashioning a sentence, including prior criminal conduct for which the defendant has not been convicted, other misconduct and anti-social behavior. However, in the instant case, the very plea agreement and sentence were fashioned with an intent to incorporate Petitioner's cocaine involvement, include punishment for that very conduct, and to make unnecessary any additional prosecution. Certainly the plea agreement and the representations made by the parties would have prompted the sentencing judge to conclude that Petitioner would face no further prosecution for his cocaine involvement. Petitioner was as much as "prosecuted," convicted, and sentenced for his cocaine involvement in the Michigan Court as he was in the Florida Court. Petitioner was

sentenced in the Michigan Court specifically for his cocaine involvement, not for concealment of his involvement or for an unwillingness to reform after conviction and an opportunity to do so. His cocaine involvement was not treated or considered by the Michigan Court merely in the same manner as other misconduct is traditionally considered at sentencing. Circumstances leading to the Michigan Court's enhanced sentence are of the type the Garcia Court would undoubtedly find violative of the Double Jeopardy Clause.

Petitioner respectfully submits that this case supplies the Court with the opportunity to address this issue in a recurring factual setting, and that a definitive pronouncement on the propriety of the Florida Court's sentence will resolve conflicting opinions between the federal circuits and will be of jurisprudential significance. We therefore

respectfully request that this Court grant certiorari.

B. PETITIONER HAS BEEN PROSECUTED AND PUNISHED IN VIOLATION OF THE USE AND TRANSACTIONAL IMMUNITY GRANTED TO HIM BY THE GOVERNMENT IN THE EARLIER MICHIGAN PROSECUTION.

Petitioner submits that the Eleventh Circuit has failed to follow the guidelines and dictates this Court has set forth in Kastigar v United States, 406 U.S. 441; 32 L Ed 2d 212; 92 S Ct 1653 (1972), and Santabello v New York, 404 U.S. 257; 92 S Ct 495; 30 L Ed 2d 427 (1971), for defining and interpreting the scope of immunity within the context of a plea agreement, and that an exercise of this Court's power of supervision is necessary to enforce immunity granted the Petitioner in an earlier prosecution.

Petitioner submits that the District Court erroneously concluded that the Government carried its burden of showing

under Kastigar, supra, that the evidence it used to indict, prosecute, and punish Petitioner was derived from a source "wholly independent" of Petitioner's proffer, Grand Jury testimony, and other information given the authorities in the Western District of Michigan. The lower courts have simply refused to recognize the link between Petitioner's November, 1989, Grand Jury testimony and the majority of the evidence that led to his indictment and conviction in the instant case. It is undisputed that the Petitioner debriefed to the Government or its agents in November of 1989 and, while Petitioner did not divulge at that time any of his cocaine involvement, he did supply to the Government the names of Mark DeVries and James Muth, both of whom were involved in the distribution of marijuana and cocaine. Upon learning that Petitioner had implicated them, Muth and DeVries, as early

as January of 1990, decided to cooperate with the Government. Even assuming Florida DEA Agent Waller first learned of Mark DeVries through a custom's agent unrelated to the Michigan investigation, and learned the name of James Muth through an independent source, he obtained testimony from them in March of 1990 regarding Petitioner's cocaine involvement only because Petitioner's earlier proffer or Grand Jury testimony prompted these individuals to cooperate with the Government both in Michigan and in Florida. Further, at the time Florida DEA Agent Waller debriefed DeVries and Muth, Michigan DEA Agent Herman shared some of the substance of Petitioner's earlier Grand Jury testimony by informing Waller that the Petitioner had lied when testifying before the Grand Jury in November of 1989 about the extent of his involvement with George Marian.

In Kastigar, supra, this Court stated that the

> statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom....

406 U.S. at 460. This Court in Kastigar made clear that the immunity granted must leave the witness in substantially the same position as if the witness had claimed the Fifth Amendment privilege, because such immunity is co-extensive with the privilege and suffices to supplant it. This Court also stated that the Government's burden was a "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources," and that the witness must be protected from future prosecution based on knowledge and sources of information obtained from the compelled testimony. 406 U.S. at 454, 461-462. Had Petitioner claimed the Fifth Amendment privilege in the instant case,

DeVries and Muth would not have been sources of information from which to gather evidence to convict the Petitioner in the instant case. The Government should not be allowed to avoid the "sweeping proscription" of such immunity merely by demonstrating that Muth and DeVries were located independently when these individuals testified against the Petitioner only as a direct result of Petitioner's earlier Grand Jury testimony or proffer. Finally, Kastigar and its progeny require dismissal of an indictment of a previously immunized witness unless the Government can demonstrate that none of the evidence presented to the Grand Jury is derived, directly or indirectly, from the immunized testimony. See United States v Hampton, 775 F 2d 1479, 1489 (CA 11, 1985).

In determining the scope of transactional immunity granted under the terms of the plea agreement in the instant

case, the Eleventh Circuit found that "the terms of the agreement unambiguously precluded the Government only from (1) bringing additional criminal charges against the Petitioner in the Western District of Michigan arising out of his involvement in the distribution of marijuana, and (2) bringing additional charges against the Petitioner arising out of those transactions disclosed by the defendant in the proffer already made to the Government. 8 F 3rd, at 742. The Court reasoned that the second prong or promise aforementioned had not been violated by the Government because at the time the plea agreement was "executed" Petitioner's proffer to the Government did not include any mention of his cocaine involvement or George Marian; thus, the Government did not breach its agreement not to charge Petitioner for any conduct arising out of "those transactions

disclosed by the defendant in the proffer already made to the Government." (48a and 49a)

Petitioner submits that if the interpretation of plea agreements is an art informed by contract law principles (see United States v Garcia, 954 F 2d 12, 17 (CA 1, 1992), the Eleventh Circuit's analysis is plainly flawed. The Eleventh Circuit's opinion presupposes that the plea bargain or agreement was "executed" on December 13, 1989, or prior to the Petitioner's disclosure of his cocaine involvement. However,

> [a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied and the judgment of a court, does not deprive an accused.... [(Emphasis added)]

Mabry v Johnson, 467 U.S. 504, 507; 81 L Ed 2d 437; 104 S Ct 2543 (1989). The plea agreement in the instant case was re-affirmed in a May 24, 1990, stipulation,

reaffirmed on the record before the Michigan Court on May 25, 1990, and again at Petitioner's July 16, 1990, Michigan sentencing when the Government assured the Court that if the Court accepted the plea agreement the Petitioner would be "fully protected." Thus, Petitioner's plea agreement was "executed" at least as late as May 25, 1990, or July 16, 1990, when the Michigan District Court accepted Petitioner's guilty plea and Petitioner was thereby convicted. Proffers already made to the Government prior to May 25, 1990, would include therefore Petitioner's April, 1990, debriefing when he fully disclosed his cocaine involvement and activities with George Marian.

Neither can it be said that the Government was unaware of Petitioner's cocaine involvement before any opportunity to lawfully withdraw its bargain. Neither the Government nor the defendant is bound

by the plea agreement until it is approved by the Court. See United States v Savage, 978 F 2d 1136 (CA 9, 1992), United States v McGovern, 822 F 2d 739 (CA 8), cert. denied, 484 U.S. 956; 108 S Ct 352; 98 L Ed 2d 377 (1987). In the instant case, it was the Government's very intention that "those transactions disclosed by the defendant in the proffer already made to the Government" include the Petitioner's April, 1990, disclosure of his cocaine involvement, despite Petitioner's earlier non-disclosure. Petitioner's proffer did therefore include his cocaine involvement at the time the plea agreement was executed. At a minimum, the agreement is deficient or ambiguous for the Government's failure to designate which proffers were to be considered when defining the scope of immunity, and the provision should be read against the Government. Constitutional concerns would undoubtedly require holding

the Government to a greater degree of responsibility than the defendant for imprecisions or ambiguities in the plea agreement. See United States v Harvey, 791 FLd 294 (CA 4, 1986).

This Court has held that when a guilty plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. Santobello v New York, 404 U.S. at 262; 30 L Ed 2d at 433. The Eleventh Circuit has recently held that whether the Government violated the agreement is judged according to the defendant's reasonable understanding at the time he entered the plea. United States v Boatner, 966 F 2d 1575, 1578 (CA 11, 1992). If it was the Government's intention that "none of the information [Petitioner] imparted to us would be used in any other jurisdiction," and that if Petitioner

cooperated "other jurisdictions would not charge him," (January 24, 1991, EH, p. 91) clearly it was reasonable of Petitioner to understand based upon his plea agreement that he would not be charged in any other jurisdiction since he had fully divulged his cocaine involvement.[10] Indeed, it is hard to imagine that Petitioner would agree, in the Michigan prosecution, to cooperate in the Florida investigation, i.e., provide evidence that would incriminate himself, without an understanding that he would be immune from prosecution in Florida for at least the cocaine involvement he had already disclosed to the Government. Petitioner should be "fully protected" as the

---

[10] It has also been held that United States Attorneys are bound by one another's plea agreements unless the agreement expressly provides otherwise. United States v Carter, 454 F 2d 426 (CA 4, 1972) (en banc), cert. denied, 417 U.S. 933; 94 S Ct 2646; 41 L Ed 2d 237 (1974).

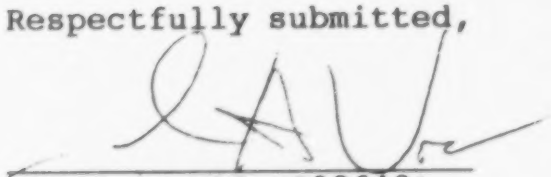
Government promised at the May 25, 1990, Michigan plea proceeding.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Court grant certiorari and issue a definitive pronouncement on the propriety of the multiple punishment in the instant case in order to resolve any conflicting opinions between the Federal Courts as well as to clarify an issue of jurisprudential significance. Petitioner respectfully prays that this Court grant plenary review, reverse the decision of the United States Court of Appeals for the Eleventh Circuit, hold that the Florida District Court's sentence in the instant case was violative of the Petitioner's Fifth Amendment protection against double jeopardy; and that this Court find as well that prosecution in this case violated immunity granted by the Government in the earlier Michigan prosecution. Petitioner prays,

therefore, that this Honorable Court vacate the judgment of the Florida District Court.

April 29, 1994 Respectfully submitted,



JOHN A. VOS (P38643)
Counsel of Record
200 North Division
Grand Rapids, MI 49503
616/235-0134

Supreme Court, U.S.
FILED

93 1729 MAY - 2 1994

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

DOUGLAS NYHUIS

Petitioner,

-vs-

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JOHN A. VOS (P38643)
Counsel of Record
200 North Division
Grand Rapids, Michigan 49503
616/235-0134

108 pp

TABLE OF CONTENTS

Published Opinion of the Court of Appeals for the Eleventh Circuit, United States v Douglas Nyhuis, 8 F 3d 731 (11th Cir., 1993).....1a

February 2, 1994, Order of the U.S. Court of Appeals Denying Petition for Rehearing and Suggestion of Rehearing En Banc.....63a

April 4, 1991, Order and Opinion of the U.S. District Court, Middle District of Florida, Denying Motion for Dismissal Based on Grounds of Double Jeopardy and Immunity.....65a

December 13, 1989, Plea Agreement in U.S.A. v Douglas Nyhuis, U.S. District Court, Western District of Michigan, Case No. G89-178-01 CR.....88a

May 25, 1990, Stipulation to Amend Plea Agreement in U.S.A. v Douglas Nyhuis, U.S. District Court, Western District of Michigan, Case No. G89-178-01 CR.....95a

July 10, 1990, Government Sentencing Memorandum in U.S.A. v Douglas Nyhuis, U.S. District Court, Western District of Michigan, Case No. G89-178-01 CR...97a

UNITED STATES of America,
Plaintiff-Appellee,

v.

Douglas NYHUIS, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Anicia Marivel RIPOLL, a/k/a Anicia Goodman, Defendant-Appellant.

Nos. 91-3628, 91-3629

United States Court of Appeals,
Eleventh Circuit.

Dec. 2, 1993.

Defendant was convicted in the United States District Court for the Middle District of Florida, No. 90-139-CR-ORL-19, Patricia C. Fawsett, J., of conspiracy to possess with intent to distribute and to distribute more than five kilograms of cocaine. Another defendant was convicted in the District Court, No. 91-4-CR-ORL-19, of aiding and abetting importation of 1,500 kilograms of cocaine. Defendants appealed.

The Court of Appeals, Carnes, Circuit Judge, held that: (1) Michigan conviction for involvement in continuing criminal enterprise did not bar conspiracy prosecution; (2) double jeopardy clause does not bar prosecution and punishment for criminal conduct that was used for sentence enhancement in earlier prosecution; and (3) person convicted as aider and abettor can be sentenced as organizer or leader.

Affirmed.

B. Robert Ohle, St. Petersburg, FL, and Stephen J. Bronis, Miami, FL, for defendants-appellants.

Robert W. Genzman, Rick Jancha, U.S. Attys., Orlando, FL, Karla Spaulding, and David P. Rhodes, Asst. U.S. Attys., Tampa, FL, for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

Before EDMONDSON and CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

CARNES, Circuit Judge:

After a joint trial, Douglas Nyhuis and Anicia Goodman appeal their convictions and sentences which resulted from their involvement in a cocaine importation and distribution conspiracy operating inside and outside the United States. Nyhuis was convicted on one count of conspiracy to possess with intent to distribute and to distribute greater than five kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Goodman was convicted on one count of aiding and abetting the importation of 1500 kilograms of cocaine in violation of 21 U.S.C. §§ 963 and 960(b)(1)(B).

Between them, Nyhuis and Goodman raise seven issues, four of which warrant no discussion. The three issues that do warrant discussion are: 1) Nyhuis's contention that the district court erred in denying his motion to dismiss the

indictment returned in the Middle District of Florida on grounds that he was being prosecuted and punished a second time for the same offense in violation of the Double Jeopardy Clause, the first time having been a conviction and sentence in the Western District of Michigan for operating a continuing criminal enterprise; 2) Nyhuis's contention that the district court erred in denying his motion to dismiss the Florida indictment on the grounds that the prosecution violated the terms of immunity he had been granted after his Michigan plea agreement; and 3) Goodman's contention that the district court erroneously considered her extraneous criminal conduct in concluding that her role in this crime was that of an "organizer or leader" under U.S.S.G. §3B1.1(a).[1] We will discuss these

[1] The four contentions we reject without further discussion are Goodman's arguments that the district court: 1) abused its discretion in refusing to grant

three contentions in the order stated, and conclude that the convictions and sentences of Nyhuis and Goodman are due to be affirmed.

I. NYHUIS'S DOUBLE JEOPARDY CLAIMS

Under a Michigan indictment, Nyhuis was convicted of being a member of a continuing criminal enterprise (CCE) involving the distribution of marijuana. Under the Florida indictment in this case, he was convicted of conspiracy to distribute

---

her a four hour continuance to allow retained counsel to be present for trial; 2) erred in granting the Government's Fed.R.Crim.P. 13 motion jointly to try her indictment with an indictment charging other defendants with a drug importation conspiracy; 3) abused its discretion in admitting collateral acts evidence concerning Goodman and her husband as "inextricably intertwined," or as "other crimes" evidence, or both, in violation of Fed.R.Evid. 403 and 404(b); and 4) erred in denying her motion for judgment of acquittal because the Government failed to present sufficient evidence at trial to support the jury's verdict. Nyhuis raises only two contentions, both of which we discuss in the text above.

cocaine. Nyhuis contends that the Michigan and Florida activities were simply two parts of the same conspiracy that existed throughout the entire period of 1983 to 1989, and that he has been convicted twice for his involvement in this single conspiracy. To support this contention, Nyhuis argues that the source of the marijuana and the cocaine was the same throughout the conspiracy and that many of the parties involved in the marijuana CCE were also involved in the conspiracy to distribute cocaine. According to Nyhuis, the Government's use of evidence of his marijuana distribution activities in its Florida cocaine case lends further support for his contention. Nyhuis also argues that because conspiracy is a lesser included offense of CCE, the Florida cocaine conspiracy charge merges into the Michigan marijuana CCE conviction so that separate convictions for the two are barred

by the Double Jeopardy Clause. Nyhuis also raises a multiple punishment challenge, contending that because the district court in Michigan considered Nyhuis's involvement in the cocaine conspiracy when it fashioned his sentence for the marijuana CCE conviction, he has been punished twice for this conduct.

A. THE FACTS

1. Nyhuis's Michigan Prosecution For Marijuana Activities

From 1983 to 1989, Nyhuis was involved in marijuana distribution in the Western District of Michigan. In the Michigan operation, Nyhuis was essentially a wholesaler who received shipments of marijuana from Florida and then allocated the goods to his retail distributors. Sometime in 1984, Nyhuis began obtaining his marijuana supply from Florida drug kingpin George Marian through a mutual friend, James Muth. After the Marian

marijuana supply line dried up in 1985, Muth continued to supply Nyhuis through the use of sources other than the Marian organization.

Two counts of a twenty-six count indictment returned in the Western District of Michigan in December of 1989 charged Nyhuis with: conspiracy to distribute and possess with intent to distribute marijuana (count one); and operation of a continuing criminal enterprise ("CCE") involving marijuana between January 1985 and October 1987 (count twenty-six). Various counts of the indictment also charged nineteen others, including James Muth; however, George Marian was not named in the indictment. The object of the conspiracy was "to make money from the unlawful distribution and sale of marihuana," with the alleged overt acts occurring principally in Michigan and Florida.

Pursuant to a plea agreement executed on

December 13, 1989, Nyhuis pleaded guilty to the CCE count, and the conspiracy count against him was dismissed. Under the terms of the agreement, the Government committed to making a recommendation of a ten-year sentence for Nyhuis. The plea agreement also contained the following clause:

> The government agrees not to bring additional criminal charges against the defendant in the Western District of Michigan arising out of his involvement in the distribution of marijuana and those transactions disclosed by the defendant in the proffer already made to the government.

The day after the agreement was executed, Nyhuis testified before a Michigan grand jury. Unfortunately for Nyhuis, he elected to conceal from the Government and the grand jury both his involvement in the cocaine trade and his relationship with George Marian. The Government independently developed evidence that indicated that Nyhuis had been less than candid with the Government and in his

grand jury testimony. As a consequence, Nyhuis's plea agreement was renegotiated upward to include a fifteen-year sentence recommendation. The Government did not seek a superseding indictment to incorporate Nyhuis's cocaine activities, and the Michigan district court granted a defense motion *in limine* prohibiting Nyhuis from being asked about his cocaine activities in his testimony at the trial of his codefendants in Michigan. After being fully informed of Nyhuis's criminal activities--both marijuana and cocaine--the district court in Michigan in July of 1990 sentenced Nyhuis to fourteen years in prison. Two days after his sentencing, Nyhuis against testified before a Michigan grand jury and this time he gave a full account of his marijuana and cocaine dealings with George Marian and others.

2. Nyhuis's Florida Prosecution For Cocaine Activities

In December of 1990, in the Middle District of Florida, an indictment was returned against twenty-three defendants, including Nyhuis and drug kingpin George Marian, for conduct relating to the importation and distribution of cocaine that had occurred from March 1985 through October 1989. Marian himself was charged with operating a CCE for the importation and distribution of cocaine. Nyhuis, named in only one count of the twenty-one count indictment, was charged with conspiring with George Marian and others to possess with intent to distribute and to distribute in excess of 5 kilograms of cocaine hydrochloride. The objects of the conspiracy included possession with intent to distribute and distribution of large quantities of cocaine outside the United States and inside, including within "Florida, Michigan, California, Washington, and elsewhere." The overt acts section of

that count specifically charged that in March of 1989 Nyhuis sent a courier from Michigan to pick up cocaine from George Marian in Florida and deliver it to Nyhuis in Michigan. It also charged that in July or August of 1989, Nyhuis facilitated a transaction involving the purchase of cocaine from George Marian in Florida and its transportation to Michigan.

The three key witnesses who testified against Nyhuis at the Florida trial were George Marian and Nyhuis's two cocaine couriers. Marian testified that Nyhuis contacted him in March of 1989 to reestablish their drug trafficking relationship. Marian also stated that he agreed to obtain for Nyhuis "small amount[s]" of cocaine in one kilogram installments. In addition, two couriers employed by Nyhuis also testified regarding Nyhuis's conduct in connection with the two overt acts in which Nyhuis was named.

Nyhuis was convicted of conspiracy to possess with intent to distribute and conspiracy to distribute cocaine.

B. DOUBLE JEOPARDY ANALYSIS AFTER *DIXON*

"The Double Jeopardy Clause affords the defendant three basic protections. The Clause protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." *United States v Cochran*, 883 F.2d 1012, 1016 (11th Cir.1989). "A denial of a motion to dismiss based on double jeopardy grounds is ... a question of law, [and] a district court's double jeopardy ruling is subject to *de novo* review by the appellate court." *United States v Benefield*, 874 F.2d 1503, 1505 (11th Cir.1989). We have also observed that "[w]hen a defendant moves to dismiss an

indictment on double jeopardy grounds, it is undisputed that he bears the burden of making a prima facie nonfrivolous claim." *Id.*. Once this threshold is crossed, "the government must prove by a preponderance of the evidence that the two indictments charge separate crimes." *Id.*. Where the defendant is charged with multiple conspiracies, "the determination as to whether the government can prosecute a defendant for more than one conspiracy turns on whether there exists more than one unlawful agreement." *Id.*

This case was briefed and argued before the Supreme Court's decision in *United States v Dixon*, ___ U.S. ___, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). In *Dixon*, the Court reaffirmed the "same-element test" drawn from its decision in *Blockburger v United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932): "In both the multiple punishment

and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies." *Dixon*, ___ U.S. at ___, 113 S.Ct. at 2856, 125 L.Ed.2d at 568. Because it concluded "that at least some of the counts at issue [in *Dixon* were] not barred by the *Blockburger* test," *id.* at ___, 113 S.Ct. at 2859, 125 L.Ed.2d at 572, the Court went on to consider whether those counts were barred by the "new, additional double jeopardy test" announced in *Grady v Corbin*, 495 U.S. 508, 510, 110 S.Ct. 2084, 2093, 109 L.Ed.2d 548, 557 (1990). *Id.* In attempting to apply *Grady*, the Court "encountered ... yet another situation in which the pre-*Grady* understanding of the Double Jeopardy Clause allows a second trial, though the 'same-conduct' test would not...." *Id.* at ___, 113 S.Ct. at 2864,

125 L.Ed.2d at 577. "[B]ecause *Grady* contradicted an 'unbroken line of decisions,' contained 'less than accurate' historical analysis, and has produced 'confusion,'" the Court admitted that *Grady* "was a mistake," and accepted the Government's invitation to overrule it. *Id.* at ___, 113 S.Ct. at 2864, 125 L.Ed.2d at 577-78.

When the present case was argued, we could only state that our double jeopardy inquiry must begin with *Blockburger*'s "same-elements test." Because *Dixon* eliminated the *Grady* "same-conduct" test, the *Blockburger* test will normally be the only inquiry required when a court is confronted with a double jeopardy attack. As the Supreme Court reiterated in *Dixon*, *Blockburger* "inquires whether each offense contains an element not contained in the other...." *Dixon*, ___ U.S. at ___, 113 S.Ct. at 2856, 125 L.Ed.2d at 568.

C. NYHUIS'S MULTIPLE PROSECUTION CLAIM

1. Double Jeopardy Analysis In The Context of Consecutive CCE And Conspiracy Charges

[1] Applying *Blockburger*, we normally would compare the elements of the CCE offense to which Nyhuis pled guilty in Michigan with the 21 U.S.C. § 846 conspiracy charge on which Nyhuis was convicted in Florida.[2] However, the

---

[2] We may disregard the § 846 conspiracy charge in the Michigan indictment which was dismissed pursuant to Nyhuis's plea agreement because jeopardy did not attach to that dismissed charge. *Cf. United States v Baggett*, 901 F.2d 1546, 1550 (11th Cir.) (holding that "the double jeopardy clause [does not] bar[] prosecution for counts dismissed as a result of a subsequently withdrawn plea bargain"), *cert. denied*, 498 U.S. 862, 111 S.Ct. 168, 112 L.Ed.2d 133 (1990); *see also United States v. Soto-Alvarez*, 958 F.2d 473, 482 n. 7 (1st Cir.) ("[J]eopardy ordinarily does not attach to counts which are dismissed and on which no finding of guilty is made."), *cert. denied*, ___ U.S. ___, 113 S.Ct. 221, 121 L.Ed.2d 159 (1992).

interplay between the CCE statute[3] and the various conspiracy statutes requires a different approach. This is so because, as the former Fifth Circuit has held:

> A double jeopardy defense will lie where the government has previously prosecuted a defendant under either § 846 [conspiracy] or § 848 [CCE] and then seeks to prosecute him again on the basis of the same criminal agreement under the other statute. "Whatever the sequence may be, he Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."

United States v Stricklin, 591 F.2d 1112,

---

[3] Continuing Criminal Enterprise is defined as follows:

For the purpose of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if--

(1) he violates any provision of this subchapter [21 U.S.C. §§ 951-971] the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter-- (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(c).

1123 (5th Cir.) (quoting *Brown v Ohio*, 432 U.S. 161, 169, 97 S.Ct. 2221, 2227, 53 L.Ed.2d 187 (1977), *cert. denied*, 444 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1979); *see also United States v Graziano*, 710 F.2d 691, 699 (11th Cir.1983) (A "§ 846 offense of conspiracy is a lesser-included offense of the § 848 offense of engaging in a continuing criminal enterprise."), *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984). However, as the *Stricklin* court made clear:

> The attachment of jeopardy to one conspiracy prosecution under § 846 does not insulate a defendant from prosecution for conducting a continuing criminal enterprise in violation of § 848 if the government has evidence of a *separate conspiracy* with which to satisfy the "in concert" element of § 848.

Stricklin, 591 F.2d at 1124 (emphasis added).

Stricklin requires that we first examine the record to determine if Nyhuis has made a prima facie showing that the events

charged in the Michigan indictment and those charged in the Florida indictment were part of a single conspiracy. *Id.* at 1122; *see also United States v Benefield*, 874 F.2d 1503, 1505 (11th Cir.1989). As we noted in *Benefield*, the former Fifth Circuit "underscored the difficulty in identifying the parameters of section 846 conspiracies" in its decision in *United States v Marable*, 578 F.2d 151, 154 (5th Cir.1978). *Benefield*, 874 F.2d at 1506. "[B]ecause a section 846 indictment may be tightly drawn, the court must look to the record to determine whether constituent elements of the two conspiracies charged indicate that the government has twice placed the defendant in jeopardy." *Marable*, 578 F.2d at 154; *see also Benefield*, 874 F.2d at 1506. To facilitate this inquiry, the *Marable* court announced a set of factors to guide the examination of the record:

> (1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events alleged as part of the conspiracy took place.

Marable, 578 F.2d at 154; *see also Benefield*, 874 F.2d at 1506. Other circuits have applied these same "*Marable* factors." *See, e.g., United States v Gomez-Pabon*, 911 F.2d 847, 860-61 (1st Cir.1990), *cert. denied*, 498 U.S. 1074, 111 S.Ct. 801, 112 L.Ed.2d 862 (1991); *United States v Tanner*, 860 F.2d 864, 866-67 (8th Cir.1988), *cert. denied*, 498 U.S. 844, 111 S.Ct. 125, 112 L.Ed.2d 93 (1990). Although the Government suggests that "[a]nother factor often used is whether the two conspiracies depend on each other for success," that factor has not been adopted in this Circuit.

2. Application Of The *Marable* Factors

a. Time

[2] The Michigan indictment alleged a time frame running from December of 1983 through October of 1987. In this Florida case, the time frame ran from "at least" March of 1985 through October of 1989. According to the Florida indictment, Nyhuis's involvement in the cocaine enterprise occurred in 1989. The mere fact that there is some overlap in the time frames alleged does not mean that the two indictments involve the same conspiracy. *United States v Tanner*, 860 F.2d 864, 866 (8th Cir.1988), *cert. denied*, 498 U.S. 844, 111 S.Ct. 125, 112 L.Ed.2d 93 (1990). On the other hand, "[t]he commission of crimes at different times does not necessarily prove that the crimes were carried out pursuant to more than one agreement." *Benefield*, 874 F.2d at 1505.

Nyhuis testified in the trial of his

codefendants in Michigan that while he was involved in the purchase and sale of marijuana from at least 1983 he did not meet George Marian until 1985. Nyhuis also stated that during his early involvement in the marijuana trade, his supplier was Michigan codefendant John Campau. When Campau went to prison in 1984, Nyhuis continued to receive his supply from Campau's sources through James and Kathy Dabbous, also codefendants in Michigan. During this period, Nyhuis did not know the identities of these sources. Thus, Nyhuis's marijuana distribution activities commenced before he became directly involved with George Marian in 1985.

Nyhuis's marijuana activities also survived a change in the Marian organization that took that organization out of the marijuana distribution business in mid-1985. During the trial of this case, Michael Shanley, an associate of

George Marian, testified that before mid-1985, Marian was engaged in the marijuana distribution business, but at that time, Marian "moved on to a different aspect of the drug business, which was drug smuggling importation." Shanley also noted that with the shift in focus of the Marian organization came a change in product from marijuana to cocaine. According to Shanley, there was a "clear-break" between the earlier marijuana distribution business and the later cocaine importation enterprise. Testimony of one of Nyhuis's Michigan codefendants, James Muth, indicated that after the Marian supply line dried up in 1985, Nyhuis looked to Muth as his source of supply for marijuana. Marian himself testified that he "kind of lost contact with Doug [Nyhuis] a couple of years there." Marian added that it was not until 1989 that he and Nyhuis met, at the initiative of Nyhuis, to discuss the

possibility of his supplying Nyhuis with small amounts of cocaine. Thus, while there was some over-lap in the times alleged in the two indictments, Nyhuis's Michigan organization existed as an independent economic entity both before and after any involvement with George Marian and his Florida-based operation. Thus, this time factor weighs against Nyhuis.

b. Co-Conspirators

The second *Marable* factor is the extent to which there is an overlap of co-conspirators. This Court observed in *Benefield* that "the fact that a conspiracy must take on additional members to accomplish one of its objectives does not in itself establish a different conspiracy." 874 F.2d at 1507; *see also United States v Nichols*, 741 F.2d 767, 772 (5th Cir.1984) ("A mere shuffling of personnel in an otherwise on-going operation with an apparent continuity will

not, along, suffice to create multiple conspiracies."), *cert. denied*, 469 U.S. 1214, 105 S.Ct. 1186, 84 L.Ed.2d 333 (1985). The Government asserts, however, that this is not a case of continuous agreement with intermittent changes in personnel: "With the exception of the defendant [Nyhuis], the case of characters actually charged in Florida is wholly different from those [sic] indicted in Michigan." Nyhuis concedes that he was the only conspirator named in both indictments but counters that the Government's primary witnesses in this Florida case--Mark DeVries and James Muth--were both named in the Michigan indictment. In addition, George Marian and witness Michael Shanley were named as possible coconspirators in a bill of particulars issued in the Michigan case.

Based on our review of the record and the indictments at issue, Nyhuis' argument,

though not without some appeal, ignores far too much. First, there is the virtually absolute dissimilarity between the defendants charged in the Michigan and Florida cases. These people moved in different, albeit equally shady, worlds and what they had in common was a connection to George Marian. Even if we indulge the unsupported notion that Marian played a more prominent role in the Michigan conspiracy than merely being one of its suppliers, it would still be possible for us to find separate conspiracies because, as the Second Circuit has observed, "[s]eparate chains of conspiracy may emanate from the same leadership." *United States v Reiter*, 848 F.2d 336, 341 (2d Cir.1988). Second, Nyhuis' relationship to the coconspirators in Michigan was that of a leader and organizer, while his role in Florida was far more modest. If Nyhuis was truly a lieutenant in one massive Marian

enterprise, his responsibility in the Florida scheme wold have been greater than is averred in the Florida indictment and established at trial. Third, with a few notable exceptions (Marian, Muth, and DeVries), the Government could not have charged most of the Florida defendants in the Michigan case, nor could it have charged most of the Michigan defendants in the Florida case. This is not a case of "tak[ing] on additional members to accomplish one of [the conspiracy's] objectives," or of a "mere shuffling of personnel in an otherwise on-going operation." Instead, the casts of characters in the two conspiracies are almost entirely different. Thus, this factor weighs against Nyhuis also.

c. Statutory Offenses Charged

The third *Marable* factor is the statutory offenses charged in the two indictments. The Michigan indictment

alleged that Nyhuis operated a continuing criminal enterprise in violation of 21 U.S.C. § 848. In addition, both the Michigan indictment and the Florida indictment charged Nyhuis with the identical statutory offense--a violation of 21 U.S.C. § 846, conspiracy to distribute and possess with intent to distribute a controlled substance. Thus, this factor weighs in Nyhuis' favor.

d. Overt Acts Charged

The fourth *Marable* factor is the overt acts charged in the two indictments which indicate the nature and scope of the activity the Government sought to punish in each case. Nyhuis concedes that "[t]he overt acts charged in the Michigan Indictment deal with marijuana and the overt acts charged in the Florida Indictment deal with cocaine," but he argues that "the actual facts that the Government set out to establish at the

Florida trial included a great deal of evidence regarding Appellant's marijuana transactions." The Government acknowledges that in this Florida case it did offer evidence regarding Nyhuis's marijuana activities in Michigan, but contends this was entirely proper--under Fed.R.Evid. 404(b) and the "inextricably intertwined" doctrine--where the "sole purpose[s]" of the evidence was to establish Nyhuis's intent in the Florida case and to explain the background of the crime charged.

Comparison of the overt acts alleged in the two indictments shows that they are dissimilar. The typical overt act alleged in the Michigan indictment was the interstate transportation of marijuana from Florida to Michigan. In the Florida indictment, the typical act is the maritime importation of cocaine from points outside the United States. Thus, this factor weighs against Nyhuis.

e. Location

The Michigan indictment alleged marijuana activities in the Western District of Michigan and in Florida. The Florida indictment alleged criminal conduct in Florida, Michigan, California, Washington, and offshore. Nyhuis makes a great deal of this locale overlap. However, review of the Florida indictment reveals that the only Michigan-based conduct alleged was that of Nyhuis. Moreover, Nyhuis was not involved in any of the offshore importation activities that pre-dominate the Florida indictment. To the extent this factor weighs in favor of Nyhuis, the weight is not substantial.

3. Conclusion

After weighing the *Marable* factors, we conclude that Nyhuis has failed to carry his burden of making out a prima facie double jeopardy claim. The record reflects that there were two conspiracies operating

in diverse locations: an earlier marijuana distribution ring, based in Michigan, headed by Nyhuis, and supplied by various individuals including George Marian; and a second operation dealing primarily in the importation of cocaine, headed by Marian and based in Florida. The almost complete diversity between the conspirators involved and the difference in overt acts alleged weighs heavily against Nyhuis. The fact that Nyhuis was involved in both conspiracies does not mean the two conspiracies were merged for double jeopardy purposes. That the two conspiracies were fundamentally different was acknowledged by Nyhuis himself. In explaining why he had initially concealed his cocaine involvement from the Government after pleading guilty in Michigan, Nyhuis told DEA Agent Scott Herman that he regarded the cocaine smuggling as "a separate deal" from the marijuana

trafficking. Indeed it was. We hold, therefore, that the Double Jeopardy Clause was not a bar to this prosecution of Nyhuis in Florida.

D. NYHUIS'S MULTIPLE PUNISHMENT CLAIM

[3] Nyhuis also contends that he was deprived of his double jeopardy protection against multiple punishments because, after his Michigan marijuana case sentence was increased based on his Florida cocaine activities, he was convicted of and punished again for those same cocaine activities in the present case. The district court found this "a far more difficult issue," explaining that "[i]t appears from the record presently before this Court that Defendant Nyhuis'[s] Michigan Plea Agreement was renegotiated to include an additional five years of imprisonment for his cocaine trafficking." The district court, however, declined to

rule on this claim when it was raised before trial. Relying on the Tenth Circuit's opinion in *United States v Koonce*, 885 F.2d 720 (10th Cir.1989), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1695, 118 L.Ed.2d 406, *and cert. denied*, ___ U.S. ___, 112 S.Ct. 1705, 118 L.Ed.2d 413 (1992), the court held that the issue of multiple punishments was not ripe for review. We need not consider whether the district court's ripeness conclusion was correct at the time of the pretrial ruling. Because Nyhuis has since been tried, convicted, and sentenced on the Florida charges, his multiple punishment claim is now ripe for review.

The issue presented is whether a defendant may be prosecuted and punished for conduct that has already been used to enhance the defendant's sentence for a conviction in an earlier prosecution. While this Court has not addressed this

specific question, those courts of appeals that have are in agreement that the Double Jeopardy Clause presents no bar to this practice. In *United States v Mack*, 938 F.2d 678 (6th Cir.1991), the defendant had his sentence on a drug conspiracy conviction enhanced because he had initially failed to appear for sentencing. Thereafter, he was indicted for a knowing failure to appear for sentencing in violation of 18 U.S.C. § 3146. He moved to dismiss that indictment on double jeopardy grounds. The district court denied the motion, and the Sixth Circuit affirmed that denial. The Sixth Circuit explained its reasoning:

> The consideration of collateral conduct for purposes of sentence enhancement is not new. Section 1B1.3 of the Sentencing Guidelines simply memorializes a long standing practice of trial judges. Prior convictions of a defendant routinely are used to determine the quantity of sentence. If Appellant is correct, then any consideration is a second punishment and therefore

> violative of the Double Jeopardy Clause.
>
> An enhanced sentence because of a prior conviction is no more double jeopardy than is a consideration of other relevant conduct, including the likelihood of a subsequent conviction.

Mack, 938 F.2d at 681.

The Seventh Circuit reached the same conclusion as the Sixth Circuit under nearly identical facts in *United States v Troxell*, 887 F.2d 830 (7th Cir.1989). In that case the sentencing judge made it clear that he considered the defendant's failure to appear on the initial sentencing date as an aggravating circumstance in sentencing her on a conviction for the distribution of cocaine. The defendant was subsequently indicted for that failure to appear at her sentencing hearing, in violation of 18 U.S.C. § 3146. The district court denied her motion to dismiss the indictment on double jeopardy grounds, and the Seventh Circuit affirmed.

Stressing that it "is important that a court have full and complete knowledge of the defendant before the imposition of a sentence ... includ[ing] 'alleged criminal activity for which the defendant has not been prosecuted,'" *id.* at 835 (citation omitted), the Seventh Circuit found that "[m]ere mention of a bad act in sentencing for a crime does not amount to attachment of jeopardy for that act." *Id.* at 836. The court held that the defendant "properly was punished for distributing cocaine in violation of 21 U.S.C. § 841(a)(1), and also was punished only once for her failure to appear for sentencing in violation of 18 U.S.C. § 3146." *Id.*

In *United States v Garcia*, 919 F.2d 881 (3d Cir.1990), the defendant had been arrested three times for drug-related offenses and used different names and addresses in each instance. The Government initially learned of only the second and

third arrests, so it only indicted the defendant for those activities. After the defendant pleaded guilty, but before sentencing, the Government learned of the other arrest and apprised the sentencing court of it. The extent to which the court relied on this information was unclear, but the defendant was sentenced at the upper end of the Guidelines range. The defendant was then indicted for the drug activities that had led to that other arrest. The defendant's motion for dismissal of those charges on double jeopardy grounds was granted, but the Third Circuit reversed, explaining:

> If we were to hold that the defendant in such a case has presented a *prima facie* case of a double jeopardy violation, such a *prima facie* case would exist in all situations where the presentence report in the first prosecution makes any reference to the unadjudicated criminal conduct. We believe considerable mischief would result if in every such case, the government had the burden of ruling out any possibility of a use that

implicates double jeopardy values.

Id. at 887.

In *Sekou v Blackburn*, 796 F.2d 108 (5th Cir.1986), the defendant argued that he was punished twice for the same offense when he was sentenced for felony-murder after the murder had been considered as an aggravating circumstance in his earlier sentencing for armed robbery. The Fifth Circuit rejected the argument:

> We hold that consideration of other crimes at sentencing does not implicate the Double Jeopardy Clause because the defendant is not actually being punished for the crimes so considered. Rather, the other crimes aggravate his guilty of, and justify heavier punishment for, the specific crime for which defendant has just been convicted.

Id. at 112. Thus, four other circuits that have address this issue have agreed that consideration of uncharged criminal activity in a prior sentence proceeding does not bar subsequent prosecution and punishment of that activity.

The district court expressed concern that Nyhuis's Michigan plea agreement was revised after his cocaine involvement came to light. The Government contends that this revision was based on the fact that Nyhuis had lied to the Government and to a grand jury about his involvement with Marian and in the cocaine business. There is a conflict in the evidence about exactly why Nyhuis's plea agreement was renegotiated to his detriment, but that factual issue is irrelevant to our decision. The Government does not dispute that the Michigan district court considered Nyhuis's cocaine activities in sentencing him on the CCE conviction, and it is the district court that set his punishment. Even if Nyhuis's Michigan sentence was enhanced because of his Florida cocaine activities, the punishment he received for those same activities in this case did not violate double jeopardy principles.

We join the Third, Fifth, Sixth, and Seventh Circuits in holding that the Double Jeopardy Clause does not bar prosecution and punishment for criminal conduct that has already been considered and used as the basis for a sentence enhancement in an earlier prosecution. The district court's denial of Nyhuis's motion to dismiss on double jeopardy grounds was proper.

II. NYHUIS'S IMMUNITY CLAIM

[4] Nyhuis claims that "the majority of the information used to indict [him in this Florida case] was obtained directly or indirectly as a result of [his] own original immunized testimony in Michigan." Nyhuis further states, "[o]bviously, all parties to the plea agreement were working under the impression that [Nyhuis] would receive immunity in Florida for his testimony and cooperation with the Government in their investigation of George Marian and his cocaine transactions."

Nyhuis argued before the district court and again on appeal that this Florida prosecution violates the protections afforded to him under the Supreme Court's decision in *Kastigar v United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). In response to Nyhuis's *Kastigar* challenge, and after several evidentiary hearings in connection with his motions to dismiss, the district court held:

> Because the indictment in the federal court in Florida was the result of an investigation conducted by Agent Waller through sources independent of Defendant Nyhuis's proffer, Grand Jury testimony, and the information given the authorities in the Western District of Michigan, use immunity will not bar the prosecution of Nyhuis in the Florid Court, *U.S. v Harvey*, 869 F.2d 1439 (11th Cir.1989). While Defendant was granted transactional immunity in the Western District of Michigan, such transactional immunity will not bar his prosecution pursuant to the Florida indictment. *United States v Brady*, [87-5578] (11th Cir. April 7, 1988).
>
> The Defendant having raised no issue that the Plea Agreement is ambiguous, the Motion to Dismiss the

> indictment of Defendant Nyhuis on grounds of immunity is denied.

In *Kastigar*, the Supreme Court reaffirmed the principles underlying the proscription against the use of immunized testimony:

> While a grant of immunity must afford protection commensurate with that afforded by the [Fifth Amendment] privilege [against self-incrimination], it need not be broader.... The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to ... criminal acts.'" Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Kastigar, 406 U.S. at 453, 92 S.Ct. at 1661 (footnote with citations omitted). This Court thoroughly reviewed the topic of immunity grants in *United States v Harvey*,

869 F.2d 1439 (11th Cir.1989). As was stated in *Harvey*, "[d]ue process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes." *Id.* at 1443. "[W]e apply the same rules and method of analysis to an informal grant of use or transactional immunity as we would to a formal grant." *Id.* at 1444 (footnote omitted). The distinctions between use and transactional immunity were carefully drawn in *Harvey*:

> Use immunity prohibits the use of compelled testimony, or any evidence derived directly or indirectly from that testimony, against the witness in a criminal prosecution. *See generally Kastigar v United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). In contrast to transactional immunity, use immunity does not prohibit the government from prosecuting the witness for crimes about which he testified, provided the government proves that it has other evidence to support the prosecution that "is derived from a legitimate source wholly independent of the compelled testimony." *Id.*, 406 U.S. at 460, 92 S.Ct. at 1665....
>
> ....

> Transactional immunity "accords full immunity from prosecution for the offense to which the compelled testimony relates." *Kastigar v United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed.2d 212 (1972). The purpose of a grant of transactional (or use) immunity is to preclude a witness's reliance on his fifth amendment privilege against compelled self-incrimination: the government may compel a witness to testify by granting him immunity, provided that the scope of the immunity is at least as great as that of the fifth amendment privilege that the witness must forego. *Kastigar v United States*, 406 U.S. at 449, 92 S.Ct. at 1659.... As such, in deciding the scope of a grant of immunity the Supreme Court traditionally has referred to the scope of the fifth amendment privilege itself.

Id. at 1444-45 (footnote and citation omitted). Our review of a *Kastigar* claim is a deferential one and "we must affirm the district court's *Kastigar* decision unless it is clearly erroneous." *United States v Dynalectric Co.*, 859 F.2d 1559, 1578 (11th Cir.1988), *cert. denied*, 490 U.S. 1006, 109 S.Ct. 1641, 104 L.Ed.2d 157 (1989).

The district court concluded extensive *Kastigar* proceedings in this case. The Government's witnesses included assistant U.S. attorneys and DEA agents involved in the Michigan and Florida investigations and prosecutions. Assistant U.S. Attorney Courtade, who prosecuted Nyhuis in Michigan, testified that "it was our understanding and intent not to grant immunity in other districts [than the Western District of Michigan], for the reason that we believe that Mr. Nyhuis would be more cooperative if under the threat of other prosecutions." DEA Agent Douglas Waller, the Florida case against who presented the indictment to the Florida grand jury, testified that before the date of the first Florida indictment in which Nyhuis was named, he had never seen any Michigan DEA reports from Nyhuis's debriefing, nor any of Nyhuis's grand jury testimony, nor any other information

furnished by Nyhuis. Agent Waller also testified as to the "independent" source of information who implicated Nyhuis in the Florida conspiracy. Finally, Agent Waller stated that he was aware of the "potential problems" under *Kastigar* in using testimony of cooperating witnesses and had been advised to "use extreme caution" in this area. The district court found this testimony persuasive and so do we.

The district court also found that Nyhuis "raised no issue that the Plea Agreement is ambiguous." Nyhuis has apparently changed his mind and now argues that the agreement is ambiguous. We cannot agree. This Court has recently articulated principles that should be employed in interpreting plea agreements:

> Plea agreements are interpreted and applied in a manner that is sometimes likened to contractual interpretation. This analogy, however, should not be taken too far.... First, ... a "hyper-technical reading of the written

> agreement" and "a rigidly literal approach in the construction of language" should not be accepted. Second, the written agreement should be viewed "against the background of the"negotiations" and should not be interpreted to "directly contradic[t an] oral understanding." Finally, a plea agreement that is ambiguous "must be read against the government." The rationale for this method of interpretation is that a plea agreement must be construed in light of the fact that it constitutes a waiver of "substantial constitutional rights" requiring that the defendant be adequately warned of the consequences of the plea.

United States v Jefferies, 908 F.2d 1520, 1523 (11th Cir.1990) (citations omitted). We find no ambiguity in the relevant provision of the plea agreement. The Government "agree[d] not to bring additional criminal charges against the defendant in the Western District of Michigan arising out of his involvement in the distribution of marijuana." It has not done so. The Government further agreed not to bring additional charges against Nyhuis arising out of "those transactions

disclosed by the defendant in the proffer *already* made to the government." (Emphasis added.) It has not done so. At the time the plea agreement was executed, Nyhuis's proffer to the Government did not include any mention of his involvement with George Marian or in the cocaine trade. Indeed, the day after he executed the agreement, Nyhuis denied such involvement in his testimony before the Michigan grady jury. The Government has offered the credible and uncontradicted testimony of Agent Waller that it subsequently developed independent information concerning Nyhuis's involvement in Marian's cocaine conspiracy. To permit Nyhuis retroactively to sweep his cocaine involvement within the ambit of the plea agreement would be an endorsement of the strategy of telling a little and hiding a lot. A defendant may not stretch an agreement beyond its terms in order to escape prosecution on deliberately

concealed conduct. Disingenuous behavior, like narcotics trafficking, comes with a price.

Nyhuis also points to his own subjective belief that he was given global immunity, and his conclusory statement that the "standardized language" in the plea agreement did not accurately reflect the agreement of the parties. Neither of these contentions is persuasive. Based on this record, we conclude that the district court's denial of Nyhuis's *Kastigar*-based motion to dismiss was not clearly erroneous.

III. GOODMAN'S "ORGANIZER OR LEADER" SENTENCING CLAIM

At Goodman's sentencing, the district court overruled her objection to the Presentence Report's recommendation of a four-level increase in the base offense level because of Goodman's role as an "organizer or leader of a criminal activity

that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). The "organizer or leader" finding resulted in a four-level enhancement to Goodman's base offense level. Based on an adjusted level of 40 and a criminal history category of I, the court sentenced her to a 312-month term of imprisonment.

A. THE FACTS

In May and June of 1988, Goodman and her husband, Ricky Goodman, who were indicted along with Marian, Nyhuis, and others, collaborated with Marian on a scheme to import a 1,500 kilogram load of cocaine into the United States. According to witnesses at her trial, Goodman and her husband were "partners" in the narcotics trafficking trade. However, the aiding and abetting charge against Mrs. Goodman relates solely to the 1,500 kilogram load.

The idea for this load originated as a

result of some trouble that Ricky Goodman was having with his Colombian sources of supply. George Marian testified at Mrs. Goodman's trial that he had heard "through the grapevine" that Ricky Goodman had been smuggling marijuana for a group of Colombians and that part of a shipment had been lost. As a result, the Colombians kidnapped Ricky Goodman. Although he was later released, Ricky Goodman needed to do a drug shipment to "work off" his debt to the Colombians. George Marian agreed to help Ricky Goodman with a load of drugs to pay Goodman's debt; however, Marian also informed the DEA of the plan. According to Marian, he and Ricky Goodman discussed the plan with a representative of the Colombian cocaine source at Marian's house. Marian's girlfriend, Donna Lemons, and Mrs. Goodman were also present in the house but did not participate in the discussions.

On the night of the transactions,

Marian, Ricky Goodman and three boat drivers met a freighter that was carrying the cocaine. After the 1,500 kilograms were offloaded, approximately ninety-eight kilograms disappeared. Marian testified that shortly after the shipment, while Marian was staying at the Goodman's home in Miami, Mrs. Goodman mentioned to him that some "pieces [of the shipment] were missing" and that she was concerned about her husband's welfare because of the missing cocaine. But Marian also stated that he did not believe that Mrs. Goodman "had any knowledge of what was going on."

At Goodman's trial, Marian's girlfriend, Lemons, testified that Goodman told her that she knew the Colombians very well and that they had bought her jewelry. Lemons also claimed to have overheard Marian, Ricky Goodman, and Mrs. Goodman discuss smuggling ventures. According to Lemons, Mrs. Goodman had stressed to her how

important the 1,500 kilogram load of cocaine was because of Ricky Goodman's debt to the Colombians, and Mrs. Goodman also had said that the Goodmans needed to make money because she was pregnant. An associate of Ricky Goodman, Stephen Pisacano, testified that Mrs. Goodman "spearheaded" the effort to get Ricky Goodman released from the Colombians, and that she participated with her husband in soliciting from Pisacano a $50,000 investment in the 1,500 kilogram cocaine venture.

Goodman now offers two arguments in support of her claim that the district court erred in adopting this recommendation. First, Goodman contends that because she was charged only as an aider or abettor of the offense, she cannot be punished for having played a leading role in it. Second, Goodman argues that § 3B1.1 requires the court to focus on "the

defendant's role in the offense," and not on any other alleged criminal conduct. According to Goodman, the court erred in improperly considering evidence of Goodman's involvement in criminal activity other than the offense of conviction.

B. THE *JONES* RULE REQUIRING PRESENTATION OF ISSUES TO SENTENCING COURTS

The well-established rule in this Circuit is that "[w]here the district court has offered the opportunity to object and a party is silent or fails to state the grounds for objection, objections to the sentence will be waived for purposes of appeal." *United States v Jones*, 899 F.2d 1097, 1103 (11th Cir.), *cert. denied*, 498 U.S. 906, 111 S.Ct. 275, 112 L.Ed.2d 230 (1990), *overruled on other grounds by United States v Morrill*, 984 F.2d 1136 (11th Cir.1993) (en banc).

In the context of evidentiary objections, we have rejected attempts to

introduce new arguments on appeal:

> To preserve an issue at trial for later consideration by an appellate court, one must raise an objection that is sufficient to apprise the trial court and the opposing party of the particular grounds upon which appellate relief will later be sought. A general objection *or an objection on other grounds will not suffice.*

United States v Dennis, 786 F.2d 1029, 1042 (11th Cir.1986) (holding that objections to testimony on hearsay and relevance grounds were insufficient to preserve a claim that the district court erred in allowing a grand juror to testify before the jury regarding the materiality of an allegedly false declaration) (emphasis added), *cert. denied*, 481 U.S. 1037, 107 S.Ct. 1973, 95 L.Ed.2d 814 (1987); *see also United States v Williford*, 764 F.2d 1493, 1502 (11th Cir.1985) (where counsel argued that admission of sentencing transcript from another case constituted bolstering of a witness's credibility, but made only "vague

reference[s] to a concern about the inability to cross-examine the agents," such "statements were not sufficiently specific to apprise the trial judge of a hearsay objection"). The interests to be protected by the contemporaneous objection rule are no less important in the context of the sentencing process. Under the *Jones* rule, defendants have ample opportunity to articulate to sentencing courts their objections to presentence reports and to the court's sentencing decisions.

C. GOODMAN'S ARGUMENT THAT AN AIDER AND ABETTOR CANNOT BE SENTENCED AS AN ORGANIZER OR LEADER

[5] The question of whether Goodman waived her argument that an aider and abettor cannot receive an enhancement as an "organizer or leader" is a close one. However, we need not decide the waiver question because we find Goodman's contention to be without merit. *See, e.g., Smith v Dugger*, 840 F.2d 787, 791 (11th

Cir.1988) (declining to decide a procedural default issue because after considering "the merits it [was] apparent there [was] no substance to the constitutional claim"), *cert. denied*, 494 U.S. 1047, 110 S.Ct. 1511, 108 L.Ed.2d 647 (1990).

Goodman concedes that a person convicted of aiding or abetting "is punishable as a principal." 18 U.S.C. § 2(a); *see also* U.S.S.G. § 2X2.1. The commentary to § 2X2.1 explains that "[t]his section provides that aiding and abetting the commission of an offense has the same offense level as the underlying offense." U.S.S.G. § 2X2.1, comment. (backg'd.). Goodman cites no authority, and we have found none, which holds that "aiding and abetting" and "organiz[ing] or lead[ing]" are mutually exclusive when it comes to sentencing.

The rule advocated by Goodman would mean that a defendant who is indicted as an

aider and abettor and whose full level of involvement in a crime only comes to light during trial cannot receive the measure of punishment commensurate with her level of participation. That would not be good. Moreover, such a rule would be inconsistent with our decisions permitting unindicted conduct to serve as a basis for sentence enhancements. *See, e.g., United States v Ignancio Munio*, 909 F.2d 436, 438-39 (11th Cir.1990) (holding that, although the indictment did not charge an amount of counterfeit currency greater than $10,840, court could consider the evidence of defendant's connection with $1.1 million in counterfeit currency), *cert. denied*, 499 U.S. 938, 111 S.Ct. 1393, 113 L.Ed.2d 449 (1991). The rule Goodman advocates would also be inconsistent with our rule that "'an acquittal does not bar a sentencing court from considering the acquitted conduct in imposing sentence,' if the

conduct is established by reliable evidence." *United States v Lynch*, 934 F.2d 1226, 1234 n.8 (11th Cir.1991) (quoting *United States v Rivera-Lopez*, 928 F.2d 372, 373 (11th Cir.1991) (per curiam)), *cert. denied*, ___ U.S. ___, 112 S.Ct. 885, 116 L.Ed.2d 788 (1992). Because evidence of unindicted conduct and of conduct for which the defendant has been acquitted can be considered in sentencing, it follows that evidence that goes beyond an averment of the indictment can be considered as well. If the Government establishes by a preponderance of the evidence that a defendant convicted as an aider and abettor was, in fact, an organizer or leader of the offense conduct, that is sufficient under § 3B1.1.

D. GOODMAN'S ARGUMENT THAT THE DISTRICT COURT RELIED IMPROPERLY ON EVIDENCE OF GOODMAN'S OTHER CRIMINAL CONDUCT IN SENTENCING HER AS AN ORGANIZER OR LEADER UNDER U.S.S.G. §3B1.1

While Goodman's first contention

presented a close waiver question, her second one does not. Goodman did object to the Presentence Report's recommendation of a four-level increase on the grounds that such an increase was not supported by the evidence adduced at trial. Goodman failed to suggest to the district court, however, that it had improperly considered evidence of Goodman's other criminal activity. Therefore, our review of Goodman's contention is limited to determining whether the district court committed plain error. *See United States v Neely*, 979 F.2d 1522, 1523 (11th Cir.1992) ("We will only consider objections raised for the first time on appeal under the plain error doctrine to avoid 'manifest injustice.'"). We cannot say that it did. *See generally United States v Olano*, ___ U.S. ___, ___, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993) (examining the limitations on appellate authority under Fed.R.Crim.P.

52(b)).

The convictions and sentences of Nyhuis and Goodman are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-3628

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DOUGLAS NYHUIS,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON and CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the

Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CASE NO. 90-139-CR-ORL-19

DOUGLAS NYHUIS,

Defendant.

ORDER

This case was considered by the Court at evidentiary hearing on Defendant's Motions to Dismiss on Grounds of Double Jeopardy and Immunity (Doc.No. 231 and 358, filed November 14, 1990 and December 3, 1990, respectively). Counsel for both parties and the Defendant, Douglas Nyhuis, were present at these proceedings. Upon consideration, the Court enters its Order as follows:

FINDINGS OF FACT

In December 1989, Defendant, Douglas Nyhuis, was named as a Defendant in two

Counts of an indictment filed in the United States District Court in and for the Western District of Michigan. He was charged in Count One of such indictment with conspiracy to distribute and possess with intent to distribute marijuana from on or about December 1983 through on or about October 1987. In Count Twenty-six he was charged with conducting a continuing criminal enterprise for the period of on or about January 1985 through on or about October of 1987. Count Twenty-six incorporated the conspiracy charged in Count One as a predicate act.

On November 9, 1989, after a series of negotiations, Defendant Nyhuis was debriefed by the Drug Enforcement Administration agent in the presence of Assistant United States Attorney Courtade who was responsible for prosecuting the charges contained in the indictment. During the course of this debriefing,

Nyhuis stated that George Marian was a high school friend of James Muth and that the only association of Nyhuis with Marian was when Marian rented a house to Patricia Miller. Nyhuis also explained his association with marijuana distribution and sales organization without mentioning the name of George Marian. The contents of this debriefing were reported in a DEA Form 6 by Agent Scott Herman (Government's Exhibit 6).

On December 13, 1989, Defendant Nyhuis executed a Plea Agreement under which he agreed to enter a plea of guilty to County Twenty-six of the pending indictment. This Plea Agreement by express provision was limited to the Western District of Michigan:

> [T]he government agrees not to bring additional criminal charges against the defendant in the Western District of Michigan arising out of his involvement in the distribution of marijuana and those transactions disclosed by the defendant in the

proffer already made to the government (Government's Exhibit 3).

Under the Plea Agreement, Nyhuis was given immunity in the Western District of Michigan for information given during his proffer on November 9, 1989. The information supplied during the proffer involved solely marijuana transactions, did not involve cocaine, and made reference to George Marian only as noted earlier in this Order.

On December 14, 1989, Nyhuis testified before the Grand Jury in the Western District of Michigan (Government's Exhibit 4). During the course of this testimony, Defendant again denied any involvement with George Marian except with reference to the rental by Marian of a house to Patricia Miller (Transcript pages 47 to 48). This statement was not true. Further, in response to questions asked during the proceedings, the Defendant Nyhuis spoke

only of marijuana transactions and did not reveal any transactions involving cocaine.

In the interim, Mr. Herman and Mr. Courtade learned from sources other than Defendant Nyhuis that Nyhuis had been involved with cocaine and, in particular, that he had been involved in the sale and distribution of cocaine with George Marian. This information came from debriefings of Mr. Mark DeVries, James Muth, Jim and Kathy Dabbous and Jeff Weimer. Some of these witnesses were named in the Government's Bill of Particulars filed on March 27, 1990 (Defendant's Exhibit 10).

Thereafter, Herman and Courtade advised Nyhuis and his attorney that in their opinion he had been lying to them, and Defendant admitted his involvement in cocaine trafficking with George Marian at a debriefing held April 6, 1990. Both Courtade and Herman testified that Defendant gave a variety of reasons why he

withheld from them the information on cocaine and Marian, but the primary reason he gave was that he felt it would be a lever to further reduce his sentence and that the cocaine transactions were a "separate" deal from the marijuana transactions. A summary of the April 6, 1990 debriefing is contained in Herman's DEA Form 6 (Government's Exhibit 10).

On May 25, the Defendant with his counsel and the Assistant United States Attorney stipulated to amend the Plea Agreement, changing paragraph 4(a), which provided for a recommended sentence of ten (10) years, to a provision that the sentence imposed upon the Defendant would not exceed fifteen (15) years (Government's Exhibit 7). The Government explained in a sentencing memorandum dated May 24, 1990, that the increased exposure contained in this amendment to the Plea Agreement was due to the Defendant's failure to cooperate

(Defendant's Exhibit 2).

Thereafter, Defendant Nyhuis testified at the trial of his co-conspirators pursuant to the pending indictment in the Western District of Michigan, such testimony being given on June 5, 6 and 7, 1990. On a Motion in Limine, the Court excluded any reference to cocaine during the course of this trial. The trial resulted in convictions after the Government proved that George Marian was involved in marijuana trafficking which began before 1983 and which involved Nyhuis.

The sentencing of Defendant Nyhuis was held on July 16, 1990 in the Michigan federal court before the Honorable Judge Richard A. Enslen. The Government's Sentencing Memorandum filed May 24, 1990 (Defendant's Exhibit 2) contains reference to the Defendant's involvement with cocaine trafficking. Mr. Courtade also testified

that at sentencing the Judge considered Mr. Nyhuis' involvement with cocaine (see Doc. No. 587, pp. 7-9, 26, & 29). The transcript of the sentencing proceeding (Doc. No. 587) confirmed that Judge Enslen considered Mr. Nyhuis' involvement with cocaine.

Contrary to evidence presented to this Court which indicated that any increase in the stipulated sentence included in Nyhuis' amended plea agreement (Government's Exhibit 7) was a result of Nyhuis' failure to cooperate and his concealment of information from the Michigan authorities (see Defendant's Exhibit 2), the transcript of the sentencing proceeding held in Michigan on July 16, 1990, reveals that Mr. Courtade told the Michigan Court that the reason the Plea Agreement with Mr. Nyhuis had been amended was to increase the agreed upon minimum sentence from ten years to fifteen years of imprisonment to include

Mr. Nyhuis' involvement with cocaine trafficking:

> [the] agreement was 15 years, which we believe would have been covered by the involvement with cocaine, if we divorced all of the marijuana from the case, or it would have been an agreement that should he have lied -- and I stress to the Court that he did not lie to the grand jury about his involvement in cocaine; there was no lying that took place. Should he have, we believe that that would have warranted five years in and of itself.
>
> So we agreed, we -- it was part of our negotiation strategy -- and we arranged that his sentence reflect not only his involvement with cocaine, but should he have been asked those questions, it was an understanding that he could have faced five more years, and you would have given him five more years, or at least five.
>
> So it was kind of a com-, of the adding of the potential criminality should he have lied -- which he did not do -- and his involvement with cocaine divorced from the marijuana, we just figured they were both worth five years, and this is what we thought (Doc. No. 587 pp. 8 & 9).[1]

---

[1] This Court notes that contrary to the representation by Mr. Courtade to the Michigan Court in the sentencing proceeding

This information provided to Judge Enslen at the time of sentencing and Judge Enslen's comments at sentencing indicate that the July 16, 1990, sentence included a separate punishment for Mr. Nyhuis' cocaine involvement.[2]

Defendant thereafter testified as a witness in another Grand Jury proceeding held July 18, 1990 in Grand Rapids, Michigan (Court's Exhibit 1, partially under seal). Following this testimony, on application of Defendant to reduce his sentence, the Government filed a response on November 29, 1990 in which the

---

noted above, Mr. Courtade testified in this Court that Mr. Nyhuis had in fact lied to the Grand Jury which fact was known to the Govern at the time of the July 16, 1990, sentencing proceeding. See also discussion at page 3 above.

[2] Regarding Mr. Nyhuis' cocaine involvement Judge Enslen made the following remarks: "He [Dennis Erickson] had, as did Mr. Nyhuis, a past history in dealing with cocaine (Doc. No. 587, p. 26)," and "Somebody sells cocaine as he [Mr. Nyhuis] did. Somebody dies (Doc. No. 587, p. 29)."

Government argued that it had not negotiated non-prosecution agreements with other federal districts in order to get Defendant's cooperation and to increase his value as a witness in other districts which might wish to consider granting him immunity even though his cooperation had been suspect.

Meanwhile, in Florida, DEA Task Force Agent Douglas Scott Waller had begun investigating George Marian and his cocaine trafficking business in November of 1989.[3] The development of information on the cocaine transactions of George Marian by the DEA Agents in the Middle District of Florida was separate and independent from any information that had been provided by Douglas Nyhuis to the agents or the Assistant United States Attorney in the

[3] The investigation of Marian had begun in November of 1988 in Florida before Agent Waller began his work with the Drug Enforcement Administration.

Western District of Michigan. Agent Waller testified that although he had gone to the Western District of Michigan to debrief witness Muth, DeVries, and Mr. and Mrs. Dabbous on March 21, 1990, he did not see the DEA 6 forms prepared with references to the Nyhuis debriefings, he had not heard of or reviewed the Grand Jury testimony of Mr. Nyhuis, and he did not discuss with anyone any information given by Nyhuis.[4] Mr. Waller described in detail the witnesses whom he identified, the dates they were debriefed, and the information that they

---

[4] Agent Waller testified that at the time he began the investigation and again in January of 1990 when Mr. Marian began cooperating with the Government, he was advised of the problems identified in Kastigar v. United States, 406 U.S. 441 (1972), and in particular he was aware that he should not take any documents or information concerning Marian from any other agency on cooperating witnesses. Waller testified that he did not take documents or information concerning this investigation from other agencies, except for a statement which he received early in the investigation from a witness in California named George Shelky.

gave him concerning Defendant Nyhuis. Pursuant to this investigation, Defendant Nyhuis, George Marian and others were named as Defendants in an indictment filed in October of 1990 in the United States District Court for the Middle District of Florida. Defendant Nyhuis is charged in Count Two of this indictment with conspiracy to possess with intent to distribute cocaine from about March, 1985 until at least October, 1989.[5]

During the course of the evidentiary

---

[5] Defendant Nyhuis is charged in Count Two of the indictment with conspiracy to possess with intent to distribute cocaine from about March, 1985 until at least October, 1989. On November 29, 1990, the first superseding indictment was filed, and on December 12, 1990, the second superseding indictment was filed in this case. Agent Waller testified that as to all three indictments he did not receive information from anyone concerning Mr. Nyhuis and his cooperation except from witnesses who had participated in the narcotics trafficking business whom he independently identified and debriefed during the course of his investigation centered in Florida.

hearing held before this Court, Mr. Courtade testified that his office viewed the marijuana conspiracy and the cocaine conspiracy as two separate conspiracies, not only because the drugs which were the subject of the conspiracies were different but also because: (1) the supply lines did not have the same "overlap" of participants, (2) the Defendant was not involved in the marijuana business from 1987 through 1989, (3) George Marian had switched from the sale of marijuana to the sale of cocaine in 1985, and (4) the Government did not know of the cocaine conspiracy until after Douglas Nyhuis entered his Plea Agreement which was limited to the marijuana conspiracy.[6]

---

[6] From the evidence presented at the evidentiary hearing before this Court, not only from agent Waller explaining the course of his investigation but also from various participants in the cocaine and marijuana importation and distribution organization, it appears that in 1985 Marian changed his business operation to

CONCLUSIONS OF LAW

Because the indictment in the federal court in Florida was the result of an investigation conducted by Agent Waller through sources independent of Defendant Nyhuis' proffer, Grand Jury testimony, and the information given the authorities in the Western District of Michigan, use immunity will not bar the prosecution of Nyhuis in the Florida Court, U.S. v Harvey, 869 F.2d 1439 (11th Cir. 1989). While Defendant was granted transactional immunity in the Western District of Michigan, such transactional immunity will

---

cocaine importation and abandoned his marijuana distribution business. Other people moved into the vacuum this created and continued the marijuana distribution network which had been established by Marian. However, a determination that the conspiracy involving cocaine charged in the Florida indictment is a separate conspiracy from the continuing criminal enterprise involving marijuana in the Michigan indictment is not necessary to the Court's decision on the Defendant's pending motions.

not bar this prosecution pursuant to the Florida indictment. United States v Brady, Case No. 97-5578 (11th Cir. April 7, 1988).

The Defendant having raised no issue that the Plea Agreement is ambiguous, the Motion to Dismiss the indictment against Defendant Nyhuis on grounds of immunity is denied.

Defendant argues that the prosecution against him in Florida is barred by the principle of double jeopardy because the cocaine conspiracy charged in the Florida indictment and the marijuana conspiracy charged in the Michigan indictment involved the same conspiracy and further that the cocaine trafficking alleged in the Florida indictment was an underlying overt act to the continuing criminal enterprise charged and to which he entered a plea of guilty in

the Michigan federal court.[7]

The Double Jeopardy Clause of the Fifth Amendment protects individuals against a second prosecution for the same offense after either acquittal or conviction. U.S. Cont. Amend. V; Albernaz v. United States, 450 U.S. 333 (1981). Defendant Nyhuis claims that the prior continuing criminal enterprise conviction in Michigan and the conspiracy charged in the Florida indictment are aspects of the same continuing violation of law and that the conspiracy charged in the Florida indictment merges with the continuing criminal enterprise charged in Michigan to

---

[7] The Court notes initially that from the evidence Defendant himself treated these conspiracies as separate in that he revealed his involvement in the marijuana transaction, and while falsely stating that he had no involvement with George Marian either in marijuana or cocaine trafficking, Defendant failed to reveal his involvement with cocaine trafficking until he was caught in his non-disclosure by the authorities in Michigan.

which he plead guilty. In United States v. Chagra, 653 F.2d 26 (1st Cir. 1981), cert. denied 455 U.S. 907 (1982), the First Circuit held that conviction on a continuing criminal enterprise charge does not bar, on double jeopardy grounds, subsequent prosecution for conspiracy, importation and possession which were allegedly committed and which might have been, but were not used to prove the continuing criminal enterprise violation. The Court in Chagra noted that no evidence about the subsequently charged offense was introduced in the original proceeding and further that neither the judge nor the jury in the initial proceeding could have used the subsequent activity as a basis for assessing punishment. The First Circuit reasoned that Congress had intended the continuing criminal enterprise violation to be harsh, "providing particularly severe punishments for multiple offenders," and

that enforcement would be hampered if no further prosecutions could be brought for any of the drug offenses committed during the enterprise period charged. Chagra 653 at 31-32.[8]

There was no allegation of or proof of any cocaine transactions with reference to the indictment filed or the trial on such indictment in the federal court in the Western District of Michigan. The indictment pending in the Florida federal court alleges only conspiracy to possess with intent to distribute cocaine in Count Two. Under the law if a conspiracy could have been proven but was not proven as part of an indictment charging a continuing criminal enterprise, double jeopardy will

---

[8] The Fifth Circuit has adopted the rule enunciated by the First Circuit in Chagra stating that: "the deterrent effect of the statute would be weakened if the government could not prosecute underlying offenses not relied upon." United States v. Oberski, 734 F.2d 1030 (5th Cir. 1984).

not act as a bar to a later prosecution for the conspiracy. See Chagra supra and Oberski, 734 F.2d 1030 (5th Cir. 1984).

However, Defendant Nyhuis's involvement in the sale and distribution of cocaine was considered by Judge Enslen when sentencing Nyhuis on the continuing criminal enterprise count in the Michigan Court (See Defendant's Exhibit 2). "[C]onsideration of a prior bad act at sentencing will not ordinarily create a double jeopardy bar to a later prosecution for that bad act." United States v. Garcia, 919 F.2d 881, 885 (3rd Cir. 1990); see also Sekou v. Blackburn, 796 F.2d 108 (5th Cir. 1986); United States v. Wise, 603 F.2d 1101 (4th Cir. 1979); United States v. Troxel, 887 F.2d 830 (7th Cir. 1989). "Mere mention of a bad act in Sentencing for a crime does not amount to attachment of jeopardy for that act." Troxel, 887 at 836. Additionally, a sentencing judge may use

"other bad acts . . . to evaluate the character of the defendant and the character of the crime for which he was convicted." Garcia, 919 F.2d at 886.

The Court finds that prosecution of Defendant Nyhuis pursuant to the indictment in the Florida federal court would not be barred by double jeopardy on the basis of multiple prosecution. However, a far more difficult issue under the law is raised by Defendant Nyhuis' claim that he is subject to multiple punishment in violation of the double jeopardy clause because his sentence for the marijuana conviction in the Western District of Michigan included a separate punishment for his cocaine involvement. It appears from the record presently before this Court that Defendant Nyhuis' Michigan Plea Agreement was renegotiated to include an additional five years of imprisonment for his cocaine trafficking, that Judge Enslen considered Defendant Nyhuis' cocaine

trafficking in fashioning a sentence for Defendant Nyhuis, and that Defendant Nyhuis received punishment from the Court in the Western District of Michigan for his cocaine trafficking which is also the subject of the present Florida indictment.

While the Eleventh Circuit has not yet ruled on this issue the Tenth Circuit has held that it would be consistent with double jeopardy to permit a defendant to be prosecuted for a crime even though evidence concerning the defendant's commission of that crime had already been used to enhance the defendant's sentence for an earlier offense. United States v. Koonce, 885 F.2d 720 (10th Cir. 1989). "Unless and until defendant receives some punishment from the district court that is arguably multiple, the issue is not ripe for review." Koonce, 885 F.2d at 722. Therefore, following the logic of the Tenth Circuit, the Court determines that the issue of multiple

punishments is not yet ripe for review and declines to dismiss the indictment against Defendant Nyhuis.[9]

Upon consideration and for the reasons stated above, Defendant Nyhuis' Motions to Dismiss the Indictment on grounds of Double Jeopardy and Immunity (Doc. Nos. 231 and 358, filed November 14, 1990 and December 3, 1990, respectively) are DENIED.

DONE AND ORDERED at Orlando, Florida, this 4th day of April, 1991.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

[9] Although adhering to the logic of the Tenth Circuit's double jeopardy argument, the Court notes that the result of trying a defendant only to have his sentence discarded on double jeopardy grounds will result in a waste of both the Court's time and the taxpayers' money.

UNITED STATES OF AMERICA

IN THE U.S. DISTRICT COURT FOR THE

WESTERN DISTRICT OF MICHIGAN,
SOUTH DIVISION

- - - - - - - -

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DOUGLAS NYHUIS,

Defendant.
_____/

No. G89-178-01 CR

Hon.

PLEA AGREEMENT

The United States of America, by and through John A. Smietanka, United States Attorney for the Western District of Michigan, and Mark V. Courtade, Assistant United States Attorney, and the defendant, Douglas Nyhuis and his attorney, James M. Catchick, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, have entered into an agreement resolving this matter by a plea of guilty under the following terms and conditions:

1. In the Western District of Michigan, the defendant, Douglas Nyhuis, agrees to plead guilty to that count of an indictment charging him with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848 prior to 1988. The defendant realizes this offense is punishable by a mandatory prison term of ten years, a maximum potential penalty of life imprisonment and a fine of $2,000,000. The defendant realizes that a $50.00 special assessment will also be assessed upon a plea to this charge. The defendant further understands that a sentence under this section is not probationable and may not be suspended.

2. The defendant agrees to fully cooperate with the Drug Enforcement Administration, the United States Attorney's Office and any other law enforcement agency in the investigation of past crimes over which they have actual or

apparent jurisdiction. This cooperation consists of all steps needed to uncover and prosecute such crimes including but not limited to: truthfully answering investigators' questions, meeting with prosecutors before testifying, truthfully testifying before grand juries and at trial and providing relevant objects, documents and photographs in the defendant's possession or under his control. The defendant will submit to polygraph examination(s) upon request. The frequency and duration of such cooperation is at the government's discretion.

3. The defendant agrees to fully cooperate with the government in its seizure and forfeiture of assets under 21 U.S.C. § 853 which encompass among other things all proceeds of drug trafficking, assets purchased with such drug proceeds and assets used or intended to be used in furtherance of such trafficking.

Specifically, the defendant shall truthfully answer all inquiries by the government regarding such matters, testify truthfully as required, supply all available documentation, and assist in the location of any concealed assets. The government recognizes that persons other than the defendant are not bound by this agreement and may persist in claims, whether valid or not.

4. The United States Attorney's Office agrees:

> (a) To make a binding sentence recommendation that the sentence to be imposed by the court be one of ten years (the statutory minimum). This will be a binding recommendation pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C); and
>
> (b) The government agrees to make a non-binding recommendation that the sentence imposed by the court run concurrent with a sentence the defendant is currently serving in Michigan. If the court does recommend a concurrent term, the United States Attorney's Office for the Western District of Michigan will not oppose the defendant's

efforts to have the balance of his Michigan sentence served in federal custody. The United States Attorney's Office has made no promises or representations to the defendant concerning the likelihood of his success in arranging such a scenario and the defendant's success in such an endeavor shall not be material to this plea agreement.

(c) The government agrees not to bring additional criminal charges against the defendant in the Western District of Michigan arising out of his involvement in the distribution of marijuana and those transactions disclosed by the defendant in the proffer already made to the government.

(d) To dismiss Count I of the Information at the time of sentence.

5. The United States Attorney for the Western District of Michigan will forebear from charging other members of the defendant's, Douglas Nyhuis's, immediate family with offenses arising from the defendant's involvement in marijuana distribution and now known to the United States Attorney for the Western District of Michigan and currently under investigation.

6. Defendant Douglas Nyhuis

acknowledges that by such plea of guilty provided for herein, there will be no trial of any kind and that by such plea he waives his right to trial by jury or by the court, as well as his right against self-incrimination, his right to confront and cross-examine witnesses against him and to call witnesses to testify in his behalf.

7. Defendant Douglas Nyhuis acknowledges his plea of guilty is voluntary and knowingly made and is not the result of force or threats or promises apart from this plea agreement and that this plea agreement represents the entire agreement between the parties.

8. Should this plea agreement be rejected, withdrawn or breached all provisions herein shall be rendered null and void and the United States shall hereby be free to bring such additional charges as the law, facts and situations warrant.

Respectfully submitted,

JOHN A. SMIETANKA
United States Attorney

MARK V. COURTADE
Dated: 12-13-89 Assistant U.S. Attorney

DOUGLAS NYHUIS
Dated: 12-13-89 Defendant

JAMES CATCHICK
Dated: 12-13-89 Attorney for Defendant

UNITED STATES OF AMERICA

IN THE UNITED STATES COURTS FOR THE

WESTERN DISTRICT OF MICHIGAN,
SOUTH DIVISION

- - - - - - - - -

UNITED STATES OF AMERICA,

Plaintiff, No. G89-178 Cr.
Hon. Richard A. Enslen

vs.

DOUGLAS NYHUIS a/k/a DOUGLAS DEVRIES, JOHN CAMPAU, JAMES MUTH, CHARLES ANDREWS, DAVID VANHALSEMA, DAVID MANGLES, CINDY MANGLES, JAMES DABBOUS, KATHY DABBOUS, JOHN GALE, JEFF BAKKE, RICHARD RAU, FREDERICK DEVRIES, MARK DEVRIES, GARY VANHOOK, STEPHEN BROWN, DIRCK MORRIS, SERGE LISK, EARLE JAMES WATTERWORTH III, a/k/a JAMES WATTERWORTH, and PAM WATTERWORTH

Defendants.
_____/

STIPULATION TO AMEND PLEA AGREEMENT

The United States of America by and through its attorneys, John A. Smietanka, United States Attorney for the Western District of Michigan, and Mark V. Courtade, Assistant United States Attorney, and defendant Douglas Nyhuis and his attorney,

James Catchick, stipulate and agree that the Plea Agreement between the parties placed on the record on January 29, 1990, may be amended as follows:

(1) Paragraph 4(a) shall now state:

> "(a) To make a binding sentence recommendation that the sentence to be imposed by the court ~~be one of~~ not exceed fifteen (15) years. This will be a binding recommendation pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C); and"

In all other respects the Plea Agreement shall remain unchanged.

Respectfully submitted,

JOHN A. SMIETANKA
United States Attorney

MARK V. COURTADE
Dated: 5-25-90 Assistant U.S. Attorney

DOUGLAS NYHUIS
Dated: 5-25-90 Defendant

JAMES CATCHICK
Dated: 5-25-90 Attorney for Defendant

UNITED STATES OF AMERICA

IN THE UNITED STATES COURTS FOR THE

WESTERN DISTRICT OF MICHIGAN,
SOUTH DIVISION

- - - - - - - -

UNITED STATES OF AMERICA,

Plaintiff,

No. G89-178-01 CR

Hon. Richard A. Enslen

vs.

DOUGLAS NYHUIS,

Defendant.

_____/

GOVERNMENT'S SENTENCING MEMORANDUM

The government has earlier provided information to the probation officer concerning the prosecution's version of the facts as they exist in this case. Additionally, the government has submitted to the probation officer information concerning mistakes in the presentence investigation which were incorporated in a supplement to the presentence report dated March 16, 1990.

The government believes that the

following information should be either added to or deleted from the presentence report:

1. The presentence report should reflect the amendment of the plea agreement that calls for the government to make a recommend that the sentence to be imposed by the court not exceed 15 years incarceration.

2. The government believes that paragraph 21 on page 6 of the presentence report should be eliminated as those facts were not proven at trial nor substantiated by the witnesses at trial.

FURTHER DRUG INVOLVEMENT OF DOUGLAS NYHUIS

In debriefing other co-defendants pursuant to cooperation agreements the government developed a clearer picture of Nyhuis's cocaine and drug dealings during the past five years. From these co-defendants (as later confirmed by the defendant) the government has learned that Mr. Nyhuis served as a "middle-man" and arranged to secure kilo quantities of cocaine on a "special order" basis on

several occasions during the past few years. This information was not available to the probation agent at the time of the original presentence report was prepared as these other co-defendants had yet to be debriefed by the government. From these sources the government has learned the following:

During the fall of 1986 Douglas Nyhuis arranged to sell between four and seven kilograms of cocaine to co-defendant Fred Devries in Hollywood, Florida. The cocaine was secured from a co-conspirator that resided in Florida.

During the winter of 1987 Douglas Nyhuis made arrangements to receive one to two kilograms of cocaine from James Muth on a front basis for $18,000 per kilogram. Douglas Nyhuis in turn sold these kilograms of cocaine to Fred Devries for $24,000 each.

In February of 1988 Douglas Nyhuis

received an additional kilogram of cocaine from James Muth for $18,000 and sold it to Fred Devries for $22,000.

Douglas Nyhuis admitted receiving one additional kilogram in early 1988, but could not recall who he delivered it to.

In February of 1989 Douglas Nyhuis contacted a Grand Rapids resident not connected with the earlier conspiracy and sent him to Florida where a kilogram of cocaine was secured from the same Florida resident mentioned above (not Muth).

That same month, Douglas Nyhuis arranged for co-defendants John Gale and Mark Devries to purchase approximately 210 pounds of high quality marihuana and transport it to Michigan. Douglas Nyhuis was to receive between $50 and $100 per pound for the marihuana secured by Gale and Devries. John Gale delivered approximately 25 pounds to Pam and Jay Watterworth and received payment from them both.

Later, Mark Devries managed to purchase one to two kilograms of cocaine from this same Florida source used earlier (the source of marihuana and cocaine was the same). According to Mark Devries, Douglas Nyhuis knew of the first kilogram in advance and provided a Florida beeper number to facilitate the purchase of the second. According to Douglas Nyhuis he arranged the first purchase of a kilogram of cocaine by Mark Devries, but was unaware of the purchase of the second until after it occurred.

From the above information the government concludes that the defendant was responsible for the purchase and distribution of between six and nine kilograms of cocaine during calendar years 1986 through 1989. The defendant was also involved in arranging the purchase of approximately 125 pounds of high quality marihuana during the spring of 1989.

SPECIFIC GOVERNMENT RECOMMENDATION

During 1984, 1985 and 1986 Douglas Nyhuis headed up a marihuana distribution organization responsible for the distribution of at least nine tons of marihuana in the Kent County, Michigan, area. During 1987 he oversaw and funded the distribution of approximately 300 pounds of marihuana while incarcerated in the Kent County Jail. Since 1987, Mr. Nyhuis has been involved in the distribution of kilo quantities of cocaine and more than 100 pounds of high quality marihuana. In May of 1989, while awaiting sentence on a state marihuana delivery charge, Mr. Nyhuis was arrested in a reverse-sting operation and possessed approximately $105,000 in cash which was the proceeds of drug trafficking. During the course of the defendant's involvement with marihuana the government believes the defendant made at least $1,000,000 in

profit (based on a nominal $60/pound profit the defendant claims -- government information from other sources suggest the defendant profited by over $100 per pound). The government seized $105,000 and the defendant claims to have lost one load of marihuana valued at $160,000 while he was incarcerated and $180,000 during the Chiefland, Florida, arrest; assuming these facts as true over one-half millions dollars remains unaccounted for. The government has never been completely satisfied with the defendant's claim that he is now "broke."

It is the government's further position that Mr. Nyhuis has been involved in the distribution of controlled substances since the mid-1970's and there appears no great likelihood that he can be rehabilitated to the point where he will not consider distributing controlled substances in the future. The government recommends that the

court accept the plea agreement between the parties, however, as the United States Attorney's Office believes Mr. Nyhuis has complied with his promise to cooperate with the government in this investigation and others. Mr. Nyhuis' testimony was crucial to securing the conviction of six co-defendants at trial recently and his publicized willingness to cooperate with authorities was a motivating factor in securing thirteen other guilty pleas from co-defendants. The government believes that the sentencing range left to the court under the terms of the plea agreement (10 to 15 years incarceration) is sufficient to assure that this court can impose an appropriate sentence. The government further stresses that the court should recognize that the defendant will not be entitled to receive the same "credits" towards his sentence as would be normally available in a marihuana distribution case

as the defendant's charge of conviction is for engaging in a Continuing Criminal Enterprise. It is the government's understanding that, based upon the charge of conviction the defendant will be required to serve approximately two-thirds of the actual sentence the court imposes even should he earn the maximum amount of disciplinary credits and good time otherwise available to him. In this regard, a sentence of 15 years by this court is in all probability equivalent to a sentence of 25 or more years on a charge of conspiracy to distribute marihuana.

With the above statement in mind, the government asks the court to accept the plea agreement negotiated between the parties and impose a sentence of 15 years incarceration. The government further recommends that this sentence run concurrent with the sentence the defendant is currently serving in Michigan.

Respectfully submitted,

JOHN A. SMIETANKA
United States Attorney

Dated: 7-10-90

MARK V. COURTADE
Assistant U.S. Attorney
399 Federal Building
Grand Rapids, MI 49503
(616) 456-2404

(3)

No. 93-1729

Supreme Court, U.S.
FILED
JUL 6 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

DOUGLAS NYHUIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

SEAN CONNELLY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

16pp

QUESTIONS PRESENTED

1. Whether, under the Double Jeopardy Clause, a court's consideration of petitioner's cocaine trafficking when it imposed sentence for a marijuana offense barred subsequent prosecution and sentencing of petitioner for a cocaine offense.

2. Whether petitioner's Florida prosecution violated any "transactional" or "use" immunity previously granted in Michigan.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Ball v. *United States*, 470 U.S. 856 (1985)	9
Bullington v. *Missouri*, 451 U.S. 430 (1981)	5, 6
Kastigar v. *United States*, 406 U.S. 441 (1972)	11
North Carolina v. *Pearce*, 395 U.S. 711 (1969)	5
Schiro v. *Farley*, 114 S. Ct. 783 (1994)	5, 6, 8
Sekou v. *Blackburn*, 796 F.2d 108 (5th Cir. 1986)	7
United States v. *Cruce*, 21 F.3d 70 (5th Cir. 1994)	7
United States v. *Garcia*, 919 F.2d 881 (3d Cir. 1990)	7
United States v. *Koonce*:	
945 F.2d 1145 (10th Cir. 1991), certs. denied, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992)	7, 8, 9
112 S. Ct. 1705 (1992)	9
United States v. *Mack*, 938 F.2d 678 (6th Cir. 1991)	7
United States v. *McCormick*, 992 F.2d 437 (2d Cir. 1993)	7, 8, 9
United States v. *Restrepo*, 946 F.2d 654 (9th Cir. 1991), cert. denied, 112 S. Ct. 1564 (1992)	8
United States v. *Troxell*, 887 F.2d 830 (7th Cir. 1989)	7
United States v. *Williams*, 935 F.2d 1531 (8th Cir. 1991), cert. denied, 112 S. Ct. 1189 (1992)	7
Williams v. *Oklahoma*, 358 U.S. 576 (1959)	6, 8

Constitution, statutes and rules:

U.S. Const. Amend. V (Double Jeopardy Clause)	5, 8
18 U.S.C. 922(h)(1) (1982)	9

Statutes and rules–Continued:

	Page
18 U.S.C. 6002	10
18 U.S.C. App. 1202(a)(1) (1982)	9
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2
21 U.S.C. 848	2
28 U.S.C. 994(*l*)	8
Sentencing Guidelines:	
Pt. 3D	8
Pt. 5G:	
§ 5G1.3(b)	8

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1729

DOUGLAS NYHUIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 8 F.3d 731. The opinion of the district court (Pet. App. 65a-87a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1993. A petition for rehearing was denied on February 2, 1994. Pet. App. 63a-64a. The petition for a writ of certiorari was filed on May 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to distribute and to possess with intent to distribute cocaine (21 U.S.C. 841(a)(1), 846). Pet. App. 3a, 13a. The district court sentenced petitioner to 324 months' imprisonment (concurrent with an earlier federal sentence in Michigan), to be followed by five years' supervised release. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. 1a-62a.

1. Petitioner conspired with George Marian and others to possess more than five kilograms of cocaine with the intent to distribute it. At trial, Marian and two of petitioner's drug couriers described how petitioner had arranged for cocaine to be delivered from Marian in Florida to petitioner in Michigan. Pet. App. 11a-12a.

2. In an earlier case, petitioner and the United States Attorney's Office for the Western District of Michigan had entered an agreement pursuant to which petitioner agreed to plead guilty to having operated a continuing criminal enterprise (CCE) involving marijuana, in violation of 21 U.S.C. 848. The government agreed, *inter alia*, "not to bring additional criminal charges against [petitioner] in the Western District of Michigan arising out of his involvement in the distribution of marijuana and those transactions disclosed by [petitioner] in the proffer already made to the government." Pet. App. 7a-9a, 92a.

The Michigan plea agreement was entered on December 13, 1989, and petitioner testified the next day before a federal grand jury in Michigan. In that testimony, however, petitioner concealed his cocaine deals and relationship with George Marian. After the government independently developed evidence of petitioner's

involvement with Marian, petitioner's plea agreement was revised to allow the government to recommend a 15-year, rather than a ten-year, sentence on the marijuana CCE count. Petitioner's offenses occurred before the advent of the Sentencing Guidelines. In July 1990, the sentencing court, after considering evidence of petitioner's cocaine trafficking as well as the marijuana CCE offense of conviction, imposed a term of 14 years' imprisonment. Pet. App. 9a-10a.

3. Petitioner was subsequently indicted in the Middle District of Florida for conspiracy to distribute and to possess with intent to distribute cocaine. Pet. App. 11a. Before trial, petitioner moved to dismiss the indictment, claiming that prosecution would constitute double jeopardy and would violate the immunity he had previously been granted. Following an evidentiary hearing, the district court denied the motion. *Id.* at 65a-87a.

The court held that neither "transactional" nor "use" immunity barred petitioner's Florida prosecution for cocaine trafficking. Pet. App. 79a-80a. The court explained that "[w]hile [petitioner] was granted transactional immunity in the Western District of Michigan, such transactional immunity will not bar this prosecution pursuant to the Florida indictment." *Ibid.* The court also explained that petitioner's use immunity would not be violated because the Florida case "was the result of an investigation conducted by [DEA] Agent Waller through sources independent of [petitioner's] proffer, Grand Jury testimony, and the information given the authorities in the Western District of Michigan." *Id.* at 79a.

The district court further held that the Florida prosecution did not violate petitioner's double jeopardy rights. Pet. App. 80a-87a. It explained that petitioner had been neither tried nor convicted in Michigan for the

cocaine trafficking conspiracy that was the subject of the Florida prosecution. *Id.* at 83a. The court deemed it "a far more difficult issue" whether a double jeopardy bar was raised by the Michigan court's consideration of petitioner's Florida cocaine trafficking in sentencing petitioner for the marijuana offense. *Id.* at 85a. It concluded, however, that this issue did not justify dismissing the indictment because it was solely a potential issue of "multiple punishment" that would not be "ripe" until sentencing. *Id.* at 86a-87a. At sentencing, the district court rejected petitioner's multiple punishment claim. Gov't C.A. Br. 3.

4. The court of appeals affirmed. Pet. App. 1a-62a. It held that neither double jeopardy nor any prior grant of immunity precluded petitioner's prosecution and sentencing in Florida for the cocaine trafficking conspiracy there. *Id.* at 13a-50a.

With respect to petitioner's double jeopardy claim, the court of appeals determined that the crimes charged in Michigan and petitioner's Florida transactions with George Marian involved different conspiracies. Pet. App. 22a-33a. It also found no merit in petitioner's claim that he could not separately be punished for the cocaine traffick-ing conspiracy in Florida because the Michigan court had considered that conduct in sentencing him for the marijuana CCE offense. *Id.* at 33a-41a.

The court of appeals then held that the district court had correctly rejected petitioner's immunity claims. Pet. App. 41a-50a. It found that the government had not violated the Michigan plea agreement because that agreement covered only transactions that were described in petitioner's pre-agreement proffer; the Marian cocaine transactions had not been described (and were denied by petitioner in his grand jury appearance the day after entering the plea); and the government established

independent investigatory sources for petitioner's participation in a cocaine-distribution conspiracy with Marian. *Id.* at 48a-50a.

ARGUMENT

1. Petitioner contends (Pet. 25-51) that the Double Jeopardy Clause precluded the Florida court from sentencing him for his cocaine trafficking conspiracy because the Michigan court had previously considered that cocaine trafficking when sentencing him for the marijuana offense. That claim lacks merit.

As this Court's recent decision in *Schiro* v. *Farley*, 114 S. Ct. 783 (1994), makes clear, a court's consideration of information at sentencing does not constitute "jeopardy" for any "offence" (U.S. Const. Amend. V) other than the one of conviction. The defendant in *Schiro* was tried but not convicted on charges of intentional murder. He argued that the Double Jeopardy Clause prevented the sentencing court from considering the intentional murder as an aggravating circumstance in imposing a death sentence for the offense of conviction (killing during a rape). 114 S. Ct. at 789. The Court rejected that contention, holding that its "prior decisions are inconsistent with the argument that a first sentencing proceeding can amount to a successive prosecution." *Ibid.* (citing cases).[1] It added:

---

[1] *Schiro* was a capital case, and the question whether "jeopardy" had attached was therefore more complex than in noncapital cases such as this one. See *Bullington* v. *Missouri*, 451 U.S. 430, 446 (1981) (because death penalty proceeding "was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available * * * with respect to the death penalty"; distinguishing noncapital cases such as *North Carolina* v. *Pearce*, 395 U.S. 711 (1969)). *Schiro*, in turn, explained that "the capital sentencing scheme at issue [in *Bullington*] 'differ[ed] significantly

> We have also upheld the use of prior convictions to enhance sentences for subsequent convictions, even though this means a defendant must, in a certain sense, relitigate in a sentencing proceeding conduct for which he was previously tried. In short, as applied to successive prosecutions, the Clause is written in terms of potential or risk of trial and conviction, not punishment.

Id. at 789-790 (citations and internal quotation marks omitted).

Similarly, in *Williams* v. *Oklahoma*, 358 U.S. 576, 585-586 (1959), the Court made clear that a defendant is not placed in "jeopardy" by a sentencing court's consideration of information regarding criminal conduct related to, yet legally distinct from, the offense of conviction. There, a defendant, after being sentenced to life imprisonment for murder, was separately charged with the kidnaping that led to his victim's death. In imposing a death sentence for this kidnaping, the sentencing court expressly relied on the ensuing murder. *Id.* at 581. This Court held that no double jeopardy violation had occurred, explaining that "in view of the obvious fact that, under the law of Oklahoma, kidnaping is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping crime cannot be said to have resulted in punishing [defendant] a second time for the same offense." *Id.* at 586.

The court of appeals was therefore correct in holding that "the Double Jeopardy Clause does not bar prosecution and punishment for criminal conduct that

---

from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing.'" 114 S. Ct. at 790 (quoting 451 U.S. at 438).

has already been considered and used as the basis for a sentence enhancement in an earlier prosecution." Pet. App. 41a. Other federal courts of appeals have reached similar conclusions. See, *e.g.*, *United States* v. *Cruce*, 21 F.3d 70 (5th Cir. 1994) (double jeopardy not violated by prosecution and sentence for bank fraud offense that a prior sentencing court had already considered in imposing sentence for separate bank fraud offense); *United States* v. *Mack*, 938 F.2d 678, 679 (6th Cir. 1991) (agreeing with holdings of other courts of appeals that "double jeopardy is not implicated when a defendant is indicted for an incident of conduct previously used to increase the length of his sentence for a separate offense"); *United States* v. *Williams*, 935 F.2d 1531, 1538 (8th Cir. 1991) ("Although the court in the [earlier] case inquired into the [later] offense during the sentencing hearing, at no time was Williams put 'in jeopardy' for the [later offense] until the actual trial for [it]."), cert. denied, 112 S. Ct. 1189 (1992); *United States* v. *Garcia*, 919 F.2d 881, 886 (3d Cir. 1990) ("consideration of a prior bad act at sentencing will not ordinarily create a double jeopardy bar to a later prosecution for that bad act"); *United States* v. *Troxell*, 887 F.2d 830, 836 (7th Cir. 1989) ("Mere mention of a bad act in sentencing for a crime does not amount to attachment of jeopardy for that act."); *Sekou* v. *Blackburn*, 796 F.2d 108, 111 (5th Cir. 1986) ("Consideration of criminal conduct as an aggravating circumstance does not convert the sentencing proceeding into a trial, conviction, or punishment for the criminal activity so considered.").

Petitioner contends (Pet. 27) that the court of appeals' decision conflicts with *United States* v. *Koonce*, 945 F.2d 1145 (10th Cir. 1991), certs. denied, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992), and *United States* v. *McCormick*, 992 F.2d 437 (2d Cir. 1993). In *Koonce* and *McCormick*,

certain criminal conduct (distinct from the offenses of conviction) had been incorporated into the Sentencing Guidelines base offense levels used in sentencing the defendants. The government then sought to prosecute the defendants for that criminal conduct. The Tenth and Second Circuits held that the prosecutions were barred by the Double Jeopardy Clause. Both cases rest on three premises: (1) a sentencing court that factors related criminal conduct into the base offense level is "punishing" the defendant for that conduct; (2) Congress did not intend for defendants to be punished separately for the offense of conviction and relevant conduct factored into the base offense level; and (3) it is not enough that the sentences be structured to run concurrently rather than consecutively. See *Koonce*, 945 F.2d at 1149-1154; *McCormick*, 992 F.2d at 439-442. We believe that each of those premises is flawed.[2]

---

[2] First, as made clear by this Court's decisions in cases such as *Schiro* v. *Farley*, *supra*, and *Williams* v. *Oklahoma*, *supra*, a defendant is "punished" at sentencing only for the offense(s) of conviction. See *Schiro*, 114 S. Ct. at 789; *Williams*, 358 U.S. at 585. The Sentencing Guidelines "do not * * * create new offenses requiring separate punishment"; rather, "the statutory penalties to which the defendant was exposed have remained unchanged with the enactment of the Guidelines." *United States* v. *Restrepo*, 946 F.2d 654, 657, 660 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1564 (1992). Second, there is no indication that Congress intended to preclude separate punishment for related offenses. Instead, Congress directed the Sentencing Commission to promulgate specific guidelines regarding the appropriate "incremental penalties" and concurrent-versus-consecutive prison terms for various related crimes. See 28 U.S.C. 994(*l*). The Commission has responded with various "grouping" rules where multiple crimes are tried jointly (Guidelines Pt. 3D) and a specific provision addressing sentences for defendants serving previous terms for related offenses (Guidelines § 5G1.3(b)). The latter provision reflects an intent not to bar successive prosecutions, but

Although the government unsuccessfully sought review of the issue in *Koonce*, 112 S. Ct. 1705 (1992), the present case does not raise that issue. The courts in *Koonce* and *McCormick* acknowledged the existence of a substantial body of authority holding that a sentencing court's consideration of a related but uncharged crime does not generally bar later prosecution for that crime. Those courts asserted, however, that a different rule should apply to criminal conduct that has previously been incorporated into the defendant's base offense level under the Sentencing Guidelines. See *Koonce*, 945 F.2d at 1152 ("[Prior] cases * * * are distinguishable, as none involved punishment for conduct that was previously aggregated into a defendant's base offense level for a related crime."); *McCormick*, 992 F.2d at 441-442 & n.5. Because petitioner acknowledges that "his Michigan conviction and sentence occurred prior to the effective date of the U.S. Sentencing Guidelines," Pet. 40, and he was not sentenced in Michigan under the

---

rather to ensure only that "the resulting term of imprisonment * * * be the same as would have resulted from a single prosecution." *McCormick*, 992 F.2d at 442 (Mahoney, J., dissenting). Finally, the courts' reliance on *Ball* v. *United States*, 470 U.S. 856 (1985), was misplaced. See *Koonce*, 945 F.2d at 1151, 1153-1154; *McCormick*, 992 F.2d at 440-441. *Ball* held that a defendant could not be separately punished for what was, in every possible instance under the *Blockburger* test, the "same offence": a felon possessing a firearm (18 U.S.C. 922(h)(1) (1982)) and that same felon receiving that same firearm (18 U.S.C. App. 1202(a)(1) (1982)). 470 U.S. at 861-864. Because "Congress did not intend [the defendant's] conduct to be punishable under both [statutes], the only remedy consistent with the congressional intent is for the [sentencing court] to exercise its discretion to vacate one of the underlying convictions." *Id.* at 864. Here, in contrast, it cannot seriously be claimed that the offenses are in all instances the "same." See Pet. App. 22a-33a.

Guidelines, his subsequent prosecution in Florida does not implicate the factor that was dispositive in *Koonce* and *McCormick*.

2. Petitioner next contends (Pet. 51-62) that the Florida prosecution violated both the "transactional" and "use" immunity he had previously been granted in Michigan. The courts below properly rejected those factbound claims.

a. Under the terms of the Michigan plea agreement, "[t]he government agree[d] not to bring additional criminal charges against [petitioner] in the Western District of Michigan arising out of his involvement in the distribution of marijuana and those transactions disclosed by [petitioner] in the proffer already made to the government." Pet. App. 92a. That agreement did not bar the prosecution at issue here. The cocaine conspiracy charge brought in Florida did not arise out of petitioner's "involvement in the distribution of marijuana" or any "transactions disclosed by [petitioner] in the proffer already made to the government." To accept petitioner's contention that the latter phrase should be construed to include cocaine dealings concealed by him prior to execution of the agreement and only later discovered by the government (Pet. 58-59) would, as the court of appeals put it, "be an endorsement of the strategy of telling a little and hiding a lot." Pet. App. 49a. Moreover, the Florida indictment cannot be said to constitute "additional criminal charges * * * in the Western District of Michigan." See *id.* at 92a.

b. The courts below were also correct in finding that the Florida prosecution was not based, directly or indirectly, on information provided by petitioner in Michigan pursuant to his plea agreement. Though petitioner was not granted formal "use" immunity in Michigan (see 18 U.S.C. 6002), the courts below assumed

that he was equally protected by an "informal" grant of use immunity. See Pet. App. 44a. The district court conducted extensive evidentiary hearings to determine whether the government had carried its burden, under *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972), of proving that its evidence was "derived from a legitimate source wholly independent of the [immunized] testimony." The district court found that the instant prosecution "was the result of an investigation conducted by [Florida-based DEA] Agent Waller through sources independent of [petitioner's] proffer, Grand Jury testimony, and the information given the authorities in the Western District of Michigan." Pet. App. 79a.[3] The court of appeals affirmed that finding as not clearly erroneous (*id.* at 45a-47a), and that fact-specific holding warrants no further review.

---

[3] Petitioner, who initially concealed his cocaine trafficking from the government, nonetheless contends (Pet. 52) that Agent Waller learned the names of potential witnesses Mark DeVries and James Muth as a result of information he provided to the Michigan authorities in November 1989. As the government's court of appeals brief explained, however, Michigan DEA agents had knowledge of these witnesses' participation in drug trafficking dating back to 1987, and Florida DEA Agent Waller's attention was directed to these witnesses following a January 1990 debriefing of an entirely different individual in Miami. See Gov't C.A. Br. 32-33. Petitioner's speculation that it was his own testimony about marijuana dealings that "prompted" these witnesses ultimately "to cooperate" with the government (Pet. 53) is insufficient to negate the government's showing that it made no direct or indirect "use" in Florida of the information provided by petitioner in Michigan.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

SEAN CONNELLY
Attorney

JULY 1994